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87-2094

No.

IN THE

Supreme Court Of The United States

October Term, 1987

GORDON TAUB - - - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY, and MARTHA LAYNE COLLINS, in her official capacity as Governor of the Commonwealth of Kentucky; the COMMERCE CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; CARROLL KNICELEY, in his official capacity as Secretary of the Commerce Cabinet of Kentucky; the FINANCE AND ADMINISTRATION CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; the HUMAN RESOURCES CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; E. AUSTIN, JR., in his official capacity as Secretary of the Human Resources Cabinet of Kentucky; and the STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY, an agency of the Commonwealth of Kentucky, - - - - - - - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

The following questions are presented for review:

1. Whether a taxpayer, as a taxpayer, has standing in a federal court to challenge the constitutionality (under Article I, §10, and the Fifth and Fourteenth Amendments to the Constitution of the United States) of a State statute, enacted under the taxing and spending authority of the State legislature, which appropriated money to purchase real property which was conveyed, without consideration, to a private, for-profit, automobile manufacturing corporation, and which appropriation, further, was tendered to that private, for-profit automobile manufacturing corporation, without consideration, to pay for its' employees' travel, training and salaries; as said statute amounts to a spending of funds, raised by taxation, for other than a public purpose?

2. Whether the holding of this Honorable Court in *Frothingham* v. *Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923) controls the issue of taxpayer standing in all cases challenging the constitutionality of *State* appropriation enactments, except *only* those cases where a violation of the Establishment Clause of the First Amendment to the Constitution of the United States is alleged?

PARTIES TO THE PROCEEDING

All the parties to the proceeding in the Court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

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No.

GORDON TAUB - - - - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, and MARTHA LAYNE COLLINS, in her official capacity as Governor of the Commonwealth of Kentucky; the COMMERCE CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; CARROLL KNICELEY, in his official capacity as Secretary of the Commerce Cabinet of Kentucky; the FINANCE AND ADMINISTRATION CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; the HUMAN RESOURCES CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; E. AUSTIN, JR., in his official capacity as Secretary of the Human Resources Cabinet of Kentucky; and the STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky, - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, GORDON TAUB, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit entered in this matter on March 29, 1988. This Petition is filed within ninety (90) days of the entry of the Opinion and Judgment below.

OPINIONS BELOW

The Opinion and Judgment of the United States District Court for the Eastern District of Kentucky at Frankfort, entered on February 20, 1987, and the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit, entered March 29, 1988, are reprinted in a separate Appendix to this Petition, pages 1a through 26a. The Opinion of the United States District Court for the Eastern District of Kentucky at Frankfort is unreported. The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 842 F. 2d 912.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit, affirming the Opinion and Judgment of the United States District Court for the Eastern District of Kentucky at Frankfort, were entered on March 29, 1988, and the Judgment was issued as mandate on April 26, 1988. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

Article I, Section 10

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> No State shall, without the Consent of the Congress, lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing

its inspection Laws; and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Sections 1 and 2

Section 1: The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time

ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States:—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

I. How the Federal Questions Were Presented

The Federal Constitutional questions involved in the cause *sub judice* were first presented in the Petitioner's Verified Complaint for Declaration of Rights and Injunctive Relief filed pursuant to 28 U.S.C. §1331, 28 U.S.C. §2201, and Rule 57 of the Federal Rules of Civil Procedure on August 27, 1986 in the United States District Court for the Eastern District of Kentucky at Frankfort. The aforesaid Verified Complaint for Injunctive Relief and Declaration of Rights states, *inter alia*, as follows:

1.

This is a civil action arising under the Constitution of the United States of America, and is brought pursuant to 28 U.S.C. §1331. Plaintiff claims that Senate Bill No. 361, amending Chapter 56 of the Kentucky Revised Statutes, and certain appropriations made for the

benefit of Toyota Motor Corporation and/or to amortize the Revenue Bonds issued for the benefit of Toyota Motor Corporation under the Budget Act of 1986, House Bill No. 398, are unconstitutional in that they are violative of Article I, §10, and the Fifth and Fourteenth Amendments to the Constitution of the United States of America. Plaintiff further claims that the Agreement entered into by and between the COMMONWEALTH OF KENTUCKY and Toyota Motor Corporation, dated February 25, 1986, together with the letters of the commitment from the Governor of the Commonwealth of Kentucky to Toyota Motor Corporation, dated December 4, 1985, and from the Secretary of THE COMMERCE CABINET OF KENTUCKY and the Secretary of THE HUMAN RESOURCES CABINET OF KENTUCKY, to Toyota Motor Corporation, dated December 4, 1985, and the Financing Agreement, Security Agreement and Assignment entered into by and between the STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY and THE COMMERCE CABINET OF KENTUCKY, dated June 1, 1986, are acts committed by the State in explicit violation of Article I, §10, and the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

2.

Plaintiff seeks a declaratory judgment that Senate Bill No. 361, amending Chapter 56 of the Kentucky Revised Statutes, and certain appropriations made for the benefit of Toyota Motor Corporation and/or to amortize the Revenue Bonds issued for the benefit of Toyota Motor Corporation, under the Budget Act of 1986, House Bill No. 398, are unconstitutional on their face. Petitioner further seeks a declaratory judgment that the Agreement entered into by and between the COMMONWEALTH OF KENTUCKY and Toyota Motor Corporation, dated February 25, 1986, together with the letters of commitment from the Governor of the Commonwealth of Kentucky to Toyota Motor Cor-

poration, dated December 4, 1985, and from the Secretary of THE COMMERCE CABINET OF KENTUCKY and the Secretary of THE HUMAN RESOURCES CABINET OF KENTUCKY to Toyota Motor Corporation, dated December 4, 1985, and the Financing Agreement, Security Agreement and Assignment entered into by and between the STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY and THE COMMERCE CABINET OF KENTUCKY, dated June 1, 1986, are acts committed by the State that are unconstitutional on their face in explicit violation of Article I, §10, and the Fifth and Fourteenth Amendments to the Constitution of the United States of America. The Court is empowered to grant such relief in this action under authority of 28 U.S.C. §2201 and Fed. R. Civ. P. 57.

3.

Petitioner seeks permanent injunctive relief, enjoining the Respondents from enforcing or in any way carrying out the provisions of Senate Bill No. 361, amending Chapter 56 of the Kentucky Revised Statutes, and spending certain appropriations made for the benefit of Toyota Motor Corporation and/or to amortize the Revenue Bonds issued for the benefit of Toyota Motor Corporation, under the Budget Act of 1986, House Bill No. 398. Plaintiff further seeks permanent injunctive relief enjoining the Defendants from enforcing or in any way carrying out the provisions of the Agreement entered into by and between the COMMONWEALTH OF KENTUCKY and Toyota Motor Corporation, dated February 25, 1986, together with the letter of commitment from the Governor of the Commonwealth of Kentucky to Toyota Motor Corporation, dated December 4, 1985, and from the Secretary of the COMMERCE CABINET OF KENTUCKY and the Secretary of THE HUMAN RESOURCES CABINET OF KENTUCKY, to Toyota Motor Corporation, dated December 4, 1985, and the Financing Agreement, Se-

curity Agreement and Assignment entered into by and between the STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY and THE COMMERCE CABINET OF KENTUCKY, dated June 1, 1986. The Attorney General of the Commonwealth of Kentucky shall be served and be heard as set forth in K.R.S. 418.075.

(Rec. Doc. 1; Complaint)

* * * *

Petitioner plead the facts in the case; that no adequate remedy at law existed; and prayed for the relevant declaratory and injunctive relief. (Rec. Doc. 1; Complaint)

II. Factual Background

In 1985 the Respondents, on behalf of the Commonwealth of Kentucky, initiated negotiations with the Toyota Motor Corporation to induce that corporation to locate its contemplated manufacturing and assembly facility in Kentucky. On December 4, 1985, after various meetings with the officials of the Toyota Motor Corporation, the Respondent, then Governor MARTHA LAYNE COLLINS, wrote to the President of Toyota Motor Corporation, Dr. Shoichiro Toyoda, and made guarantees on behalf of the Commonwealth of Kentucky that the Commonwealth would purchase a tract of land located in Scott County, Kentucky, at a cost of Fifteen Million Dollars ($15,000,000.00) and prepare the site for plant construction, at a cost of up to Twenty Million Dollars ($20,000,000.00), **as contributions to the capital of the new plant.** (Rec. Doc. 1; Complaint Ex. A, pp. 1-3)

On December 4, 1985, the Respondent, COMMERCE CABINET OF KENTUCKY, through its then Secretary, CARROLL KNICELEY, and the Respondent, HUMAN

RESOURCES CABINET OF KENTUCKY, through its then Secretary, E. AUSTIN, JR., wrote a letter to Dr. Shoichiro Toyoda, President of Toyota Motor Corporation, and guaranteed various wage subsistence incentives and financing of the training of all personnel to be hired by Toyota up to Sixty-five Million Dollars ($65,000,000.00). (Rec. Doc. 1; Complaint Ex. B, pp. 1-33) To effectuate these guarantees, the Respondents, then Governor MARTHA LAYNE COLLINS, CARROLL KNICELEY and E. AUSTIN, JR., entered into a written agreement on February 25, 1986 with Toyota Motor Corporation which obligated the Commonwealth of Kentucky to purchase the land for the project site and to convey said property to Toyota Motor Corporation, in fee simple, without charge. The Agreement further obligated the COMMONWEALTH OF KENTUCKY to pay up to Twenty Million Dollars ($20,000,000.00) for project site improvements. (Rec. Doc. 1; Complaint, Ex. C, pp. 1-8)

In order to acquire the funds for which the Respondents had obligated the Commonwealth, the Respondents obtained from the General Assembly of the Commonwealth of Kentucky, during its 1986 session, legislation to finance the agreement. The General Assembly enacted Senate Bill No. 361, which amended Chapter 56 of the Kentucky Revised Statutes to include "industrial development project[s]" within the list of projects for which the Respondent, STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY, could issue Revenue Bonds to finance out of monies raised by taxation. (Appendix 27a through 45a) Said enactment is codified at K.R.S. 56.505-514. Funds were appropriated by the General Assembly to pay for the debt created by the agreement when it enacted House Bill No. 398, the Budget Act of 1986.

Senate Bill No. 361, §3, [K.R.S. 56.510]permitted the financing of the Toyota project by the issuance of Revenue Bonds by the Respondent, STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY, at the request of the Respondents, COMMERCE CABINET OF KENTUCKY. Under this financing scheme, the Respondent, STATE PROPERTY AND BUILDINGS COMMISSION, issued Revenue Bonds to the COMMERCE CABINET—and in the name of the COMMERCE CABINET—for the financing of the Toyota Motor Corporation project. The COMMERCE CABINET, under Senate Bill No. 361 [K.R.S. 56.510 and K.R.S. 56.514] became responsible for payment of the bonds' **principal and interest,** using appropriations made by the General Assembly to that cabinet from public tax revenues generated through, *inter alia,* the state property tax.

On June 1, 1986, the Respondent, COMMERCE CABINET OF KENTUCKY, and the Respondent, STATE PROPERTY AND BUILDINGS COMMISSION, entered into a Financing Agreement, Security Agreement and Assignment for the issuing of Revenue Bonds under authority of Senate Bill No. 361 [K.R.S. 56.505-514, 56.510]. The bonds issued were to be amortized by appropriations from the General Assembly of the Commonwealth of Kentucky expended in furtherance of the Agreement of February 25, 1986 entered into by and between the COMMONWEALTH OF KENTUCKY and Toyota Motor Corporation.

It is undisputed in this case that Petitioner, GORDON TAUB, a citizen and resident of the Commonwealth of Kentucky, had paid in excess of One Thousand Two Hundred Dollars ($1,200.00) in property taxes in 1986 and had more taxes due for the balance of 1986 and for 1987. And, the Courts below acknowledged Petitioner was a taxpayer

of the Commonwealth of Kentucky for all purposes of the cause *sub judice*. (Rec. Doc. 19; Transcript of Oral Argument of 12/30/86, pp. 2-3; and see 842 F. 2d at 914)

The Petitioner, GORDON TAUB, acquired substantial property holdings in the Commonwealth of Kentucky. The land purchased by the Petitioner was near the proposed construction site for the Toyota plant. Subsequently, the COMMONWEALTH OF KENTUCKY initiated condemnation proceedings against portions of said land in the Scott Circuit Court, which Petitioner vigorously contested, and which condemnation, subsequently, was ruled unconstitutional by the Kentucky Court of Appeals on August 14, 1987. The ruling was modified on February 5, 1988.[1] The case is presently pending in the Supreme Court of Kentucky.

III. Proceedings Below

On August 27, 1986, the Petitioner filed a Verified Complaint for Declaration of Rights and Injunctive Relief in the United States District Court for the Eastern District of Kentucky at Frankfort seeking to enjoin the Respondents herein from expending certain appropriations made by the General Assembly of the Commonwealth of Kentucky for the benefit of Toyota Motor Corporation. The United States District Court for the Eastern District of Kentucky at Frankfort considered the case on cross-motions for summary judgment, and, on February 20, 1987, entered its Opinion and Judgment which granted the Respondents' motion for summary judgment and overruled the Petitioner's motion for summary judgment, thereby dismissing the aforesaid complaint. The Court's Opinion and Judgment

[1]The Kentucky Court of Appeals held that the condemnation violated K.R.S. 177.081 (the legislative grant of authority to the bureau of highways to condemn) and also violated Section 2 of the Kentucky Constitution which states:

> Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority.

dismissing the action was predicated on the jurisdictional issue of **State** taxpayer standing. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. There, oral argument was held on December 12, 1987. On March 29, 1988 the United States Court of Appeals for the Sixth Circuit filed an Opinion and Judgment affirming the Opinion and Judgment of the United States District Court for the Eastern District of Kentucky at Frankfort on the jurisdictional issue of **State** taxpayer standing, holding, *inter alia:*

> We conclude that the requirement for federal taxpayer standing announced in *Frothingham* [v. *Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923)] controls the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged.

By so holding, the Court below has required that a **State** taxpayer, challenging the constitutionality of a state appropriation statute, must show that "he or she has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement." *Frothingham* v. *Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 601, 67 L. Ed. 1078, 1085 (1923).

REASONS FOR GRANTING THE WRIT

I. The Petitioner Herein Has Standing to Challenge Legislation Enacted Pursuant to the Taxing and Spending Authority of a State Legislature Under the Holding of *Doremus* v. *Board of Education*

The seminal case announced by this Honorable Court regarding **State** taxpayer standing remains *Doremus* v. *Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952). There a **State** taxpayer challenged a State legislative enactment which provided for the reading, without comment, of five verses of the Old Testament at the

opening of each public school day. The decision of this Honorable Court therein, like the decision of the trial court, was based solely on the pleadings.

In *Doremus,* Mr. Justice Jackson, speaking for this Honorable Court, found that Mr. Doremus and his co-plaintiff failed to **allege** that there existed a "dollars-and-cents injury" in their complaint for declaratory judgment. *Doremus,* 342 U.S. at 434, 72 S. Ct. at 397, 96 L. Ed. at 480. This Honorable Court compared the pleadings in *Doremus* to those found in *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), where "Everson showed a measurable appropriation or disbursement of school district funds occasioned solely by the activities complained of." *Doremus,* 342 U.S. at 434, 72 S. Ct. at 397, 96 L. Ed. at 480. This Honorable Court then went on to hold:

> It is apparent that the grievance which it is sought to litigate here [in *Doremus*] is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct.

Doremus, 342 U.S. at 434-5, 72 S. Ct. at 397-8, 96 L. Ed. at 480.

Accordingly, under the law of *Doremus* **State** taxpayer standing will be found where there is sufficient allegation by a plaintiff that a **State** statute appropriates significant monies, raised through taxation, for an allegedly unconstitutional purpose. A reading of *Doremus* leaves no room for doubt about the meaning of "dollars-and-cents injury"

for purposes of taxpayer standing in actions challenging **State** enactments. It does not mean that a plaintiff must plead that he or she has suffered direct economic injury himself or herself; rather, it means that the **State** is appropriating significant monies for an unconstitutional purpose. If any doubt ever existed about the meaning of "dollars-and-cents injury" in *Doremus*, this Honorable Court in *Flast* v. *Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) removed that doubt completely. In defining the first nexus for **federal** taxpayer standing, this Honorable Court held:

> Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercise of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.

Flast, 392 U.S. at 102, 88 S. Ct. at 1954, 20 L. Ed. 2d at 963.

This Court then went on to say:

> This requirement is consistent with the limitation imposed upon state taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952)

Flast, 392 U.S. at 102, 88 S. Ct. at 1954, 20 L. Ed. 2d at 963.

This Honorable Court did not discuss whether the second nexus in *Flast* applied at all to **State** taxpayer standing. In fact, this Honorable Court has not, to this day, announced whether **State** taxpayer standing is determined by any more pleading requirements than those first announced in *Doremus* and restated in the first nexus for **federal** taxpayer standing set forth in *Flast*.

On the basis of such an understanding of the doctrine of **State** taxpayer standing enunciated in *Doremus* and restated in *Flast*, the United States Court of Appeals for the

Ninth Circuit in 1984 held that taxpayers who challenged a system established by the Hawaii legislature to disburse benefits to residents who had descended from aboriginal inhabitants of the islands and who alleged only the amount appropriated by the legislature for an allegedly unlawful purpose had standing in a federal court. *Hoohuli* v. *Ariyoshi*, 741 F. 2d 1169 (9th Cir., 1984) Stated the Ninth Circuit:

> The pleadings set forth with specificity the amounts of money appropriated and spent for allegedly unlawful purposes. This case fits the description of a "good-faith pocketbook action" set forth in *Doremus*, 342 U.S. at 434, 72 S. Ct. at 397 . We therefore hold that at least some of the individual plaintiffs have standing as taxpayers.[2]

Hoohuli at 1181.

Under the doctrine of **State** taxpayer standing enunciated in *Doremus*, the Petitioner here clearly has standing, as a State taxpayer, to challenge the appropriation of monies by the Kentucky General Assembly as violative of Article I, §10 and the Fifth and Fourteenth Amendments to the Constitution of the United States for he clearly alleged--and there is no dispute regarding the facts thereof --a "dollars-and-cents injury" as defined by this Honorable Court in *Doremus* and *Flast*.

The Opinion of the United States Court of Appeals for the Sixth Circuit utterly misinterprets the meaning of *Doremus*, rendering the holding therein an utter nullity.

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[2]Such an interpretation of the holding in *Doremus* was favored by the United States Court of Appeals for the District of Columbia in *Public Citizen, Inc.* v. *Simon*, 539 F. 2d 211, 218, n. 39 (D.C. Cir., 1976)

II. Petitioner Has Standing to Challenge Legislation Enacted Pursuant to the Taxing and Spending Authority of a State Legislature Under the Holding of This Honorable Court in *Flast* v. *Cohen*

The Opinion of the United States Court of Appeals for the Sixth Circuit turned on the consideration the Court gave to the doctrine of **State** taxpayer standing enunciated in *Doremus* v. *Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952) and the doctrine of **federal** taxpayer standing enunciated in *Flast* v. *Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) (in light of subsequent cases which have interpreted *Flast*).[3] The Opinion of the United States Court of Appeals, as a consequence, totally eliminates the value, as precedent, of this Honorable Court's Opinions in *Doremus* and *Flast* (assuming *Flast* applies to State taxpayer cases) for **State** taxpayer standing **except only when a challenge to a State legislative enactment—enacted under the taxing and spending power—is predicated upon the Establishment Clause of the First Amendment to the Constitution of the United States.**

A. Taxpayer Standing Is Still Viable as a Basis for Federal Jurisdiction

This Honorable Court, for all practical purposes, established the doctrine of **federal** taxpayer standing in *Flast* v. *Cohen*, 392 U.S. 83, 88 S. Ct. 1942 20 L. Ed. 2d 947 (1968). In *Flast*, this Honorable Court determined to "understake

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[3]The "progeny" of *Flast* referred to by the Court below included cases where purely "executive" conduct was challenged. In each one this Honorable Court required some "palpable injury" to be shown by the plaintiff. *United States* v. *Richardson*, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974); *Schlesinger* v. *Reservists' Committee to Stop the War*, 418 U.S. 209, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974) and *Allen* v. *Wright*, 468 U.S. 737, 1045 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Because the foregoing cases were challenges to "executive" conduct and not challenges to the validity of acts of the legislative branch enacted under the taxing and spending power, they simply do not obtain in any analysis of standing in the cause *sub judice*.

a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits." *Flast*, 392 U.S. at 94, 88 S. Ct. at 1949, 20 L. Ed. 2d at 958. Notably, that "fresh look" at taxpayer standing occurred in 1968, less than twenty (20) years ago. Since that time, *Flast* has never been overruled, and it stands today as this Honorable Court's principle declaration on the Article III requisites for taxpayer standing in cases where a litigant challenges an act of Congress enacted under the taxing and spending authority embodied in the Constitution.

This Honorable Court, in *Flast*, decided that **federal** taxpayers have standing if "they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Flast*, 392 U.S. at 102, 88 S. Ct. at 1953-4, 20 L. Ed. 2d at 963. This Court, in *Flast*, defined the two requisites for demonstrating that "necessary stake" as follows:

> The nexus demanded of federal taxpayers has two aspects to it. **First**, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952). **Secondly**, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of

> the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8. **When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.** (Emphasis added)

Flast, 392 U.S. at 102-3, 88 S. Ct. at 1954, 20 L. Ed. 2d at 963.

Thus this Honorable Court crystallized the stake necessary for taxpayer standing in claims which challenge statutes enacted pursuant to the legislative power under the taxing and spending clause of Article I, §8 of the Constitution, and which aver that the exercise of the taxing and spending power violates specific constitutional limitations on that power. Subsequently, in *Valley Forge Christian College* v. *Americans United for Separation of Church and State,* 454 U.S. 464, 478-481, 102 S. Ct. 752, 762-3, 70 L. Ed. 2d 700, 713-15 (1982), this Honorable Court gave further definition to the *Flast* doctrine by holding that *Flast* applies only where a **federal taxpayer challenges an appropriation of funds made by the legislative branch pursuant to its taxing and spending power** as distinguished from a transfer of property by the Executive Department, a purely executive action. Even under a narrow reading of *Flast* and its progeny, a **federal** taxpayer has standing to challenge appropriations of funds pursuant to the taxing and spending power of Congress.

Although *Flast* was a decision of this Honorable Court involving an Act of Congress, and, consequently, it enunciated a rule of law for **federal** taxpayer actions, the decision, because it referenced *Doremus* v. *Board of Education,* 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952) for purposes of enunciating the first nexus of taxpayer standing, has been

viewed as pronouncing a rule of law for a **State** taxpayer standing as well. This Honorable Court, of course, has **never** explicitly stated such.

It is undisputedly clear that the United States Court of Appeals for the Sixth Circuit, in the cause *sub judice*, assumed that the doctrine announced in *Flast* and its progeny apply to cases involving **State** taxpayer standing as well as those involving **federal** taxpayer standing. Assuming such would be what this Honorable Court would hold today, Petitioner herein has met the requisite nexuses announced in *Flast* and its progeny.

B. The Petitioner Met the Nexuses Necessary to Confer Taxpayer Standing Under *Flast* v. *Cohen*

In *Flast* v. *Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), this Honorable Court articulated two requisites for establishing standing as a **federal** taxpayer. First, the Plaintiff must be challenging an appropriation of funds by Congress pursuant to its taxing and spending power. *Flast*, 392 U.S. at 102, 88 S. Ct. at 1954, 20 L. Ed. 2d at 963. Second, the Plaintiff must allege that there is a specific constitutional proscription which the acts of appropriation violate. Flast, 392 U.S. at 102-103, 88 S. Ct. at 1954, 20 L. Ed. 2d at 963. From the pleadings, briefs and the transcript of the hearing in this case, it is evident these two nexuses were met by the Petitioner insofar as he has challenged a State legislative enactment.

1. *First Nexus.* It is not disputed in the record herein that the Petitioner met the first nexus of the *Flast* test which requires a challenge to an appropriation of funds by the legislature pursuant to its taxing and spending power.[4] Parenthetically, such, of course, forms the only relevant "nexus" for **State** taxpayer standing enunciated in *Doremus*

v. *Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952). The Petitioner herein plead in his Verified Complaint for Declaratory and Injunctive Relief that:

> [T]he Kentucky legislature, by enacting Senate Bill No. 361, has acted through its taxing and spending power to finance the acquisition of land to be given, without cost, to Toyota Motor Corporation, a private, for-profit corporation to pay for project site improvements, and to pay for the training of employees of Toyota Motor Corporation . . . [T]his legislative action was taken through the State's general power of taxation . . .

(Rec. Doc. 1; Complaint, pp. 1-33)

The United States District Court for the Eastern District of Kentucky at Frankfort agreed that Petitioner met the first nexus! (Appendix, p. 20a) In its Opinion, the United States Court of Appeals for the Sixth Circuit did not disagree with the Opinion of the United States District Court for the Eastern District of Kentucky at Frankfort that the Petitioner had correctly plead this first requisite nexus. 842 F. 2d at 912-919. For purposes of *Doremus*, it must be noted, the Petitioner herein would be deemed to have had standing to challenge a State legislative enactment enacted under the taxing and spending authority.

2. *Second Nexus*. The second nexus of the *Flast* doctrine requires a plaintiff to show that the laws challenged exceed "specific constitutional limitations imposed upon the exercise of the . . . taxing and spending power . . ." *Flast*, 392 U.S. at 102-3, 88 S. Ct. at 1954, 20 L. Ed. 2d at 963. The Petitioner met this second nexus by alleging and showing that Senate Bill 361 [K.R.S. 56.505-514], enacted

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[4]The power of the General Assembly of the Commonwealth of Kentucky to tax and to spend is embodied in Sections 29-62 and 170-182 of the Kentucky Constitution.

by the Kentucky General Assembly, violates the specific constitutional limitations placed upon the taxing and spending power of the State legislature by Article I, §10, the Fifth Amendment, and the Fourteenth Amendment to the Constitution of the United States.

It was with the application of the second nexus of the *Flast* test that the United States Court of Appeals for the Sixth Circuit (like the United States District Court) disagreed with the Petitioner, and, Petitioner here strongly argues, departed from this Honorable Court's holding in *Flast*. The United States Court of Appeals for the Sixth Circuit held that taxpayers as **taxpayers**, may bring constitutional challenges to **State** legislative appropriation enactments only if the enactments are challenged under the Establishment Clause! Such, of course, is clearly not what this Honorable Court stated in *Flast*. For purposes of **federal** taxpayer actions, Mr. Chief Justice Warren asserted,

> Whether the Constitution contains other specific limitations [other than the Establishment Clause] can be determined only in the context of future cases. However, whenever specific limitations are found, **we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress.** (Emphasis added)

Flast, 392 U.S. at 105, 88 S. Ct. at 1955, 20 L. Ed. 2d at 965. Clearly, this Honorable Court contemplated there could be more constitutional proscriptions than just the Establishment Clause for purposes of invoking **federal** taxpayer standing. Such must be true as well for actions challenging **State** appropriation enactments.

C. Stare Decisis Conclusively Establishes the Second Nexus of the *Flast* Doctrine

If there could be any doubt whether the Petitioner's pleadings made the necessary showing that acts taken

pursuant to the taxing and spending power of the State legislative branch violated specific Constitutional proscriptions, the history of Article I, Section 10 and the Fifth and Fourteenth Amendments to the Constitution of the United States and the long-standing law of this Honorable Court enunciated in *Citizen Savings and Loan Association* v. *City of Topeka*, 87 U.S. (20 Wall.) 655, 22 L. Ed. 455 (1875) remove all doubt.

1. TAXES CAN ONLY BE LEVIED AND COLLECTED FOR PUBLIC PURPOSES.

The Fifth Amendment to the United States Constitution commands that private property may only be taken for a public use and with just compensation. Such a commandment, prior to the ratification of the Bill of Rights, was, by implication, embodied in Article I, Section 10 of the Constitution of the United States, as establishing such a proscription against State governments. The Fourteenth Amendment, ratified after the Civil War, ultimately extended the Fifth Amendment proscriptions to State governments.

The proscription against levying taxes and spending revenues raised through taxation for other than a public purpose pre-dates the drafting of the United States Constitution and was, by implication, included in it. Much of the debate among the founding fathers with respect to the national government's use of revenues arose in their discussions in the Federal Convention—and after the convention—regarding Article I, Section 9, clause 7, the provision restricting the manner by which "money shall be drawn from the Treasury." There, the debates made clear the founders' reflection of the peoples' overriding, general concern that expenditures of public money may be made by their government for other than a public purpose, and may be concealed by their governors from their knowledge. Such fears were expressed on the floor of the Federal Con-

vention in 1787 innumerable times. See Farrand, M. ed. *Records of the Federal Convention,* Vol. I, pp. 523-526; Vol. II, pp. 12, 154, 164, 178, 280, 505, 568 and 618; Vol. III, pp. 311, 326 (New Haven, 1911). As well, such a luminary as James Madison expressed deep concern over how "public money was to be used" before the Virginia Ratifying Convention on June 12, 1787. Farrand, Vol. III, p. 311. Likewise, such a fear was expressed by George Mason before the same Virginia Ratifying Convention five days later on June 17, 1787. Farrand, Vol. III, p. 326.

Delegate James McHenry, before the Maryland House of Delegates, on November 29, 1787, remarked that the drawing of public money for a public purpose and in a manner calculated to let the public know of its use was "a regulation . . . consistent with the spirit of economy and free government . . ." Farrand, Vol. III, pp. 149-150. It was an obvious reference to concerns widely expressed that monies raised through taxation might be expended for other than a public purpose.

The **judicial** doctrine that taxes can be levied only for a public purpose was first articulated in 1853 by the Supreme Court of Pennsylvania in *Sharpless* v. *Mayor of Philadelphia,* 21 Pa. 147, 168-69 (1853). The Pennsylvania high court, using the historical precedents aforementioned, defined taxation as "a mode of raising revenue for public purposes," *Sharpless* at 169, and stated that the power to tax granted to the legislature did not include the power to raise funds for private purposes by what purports to be taxation. *Sharpless* at 168-69. From that case "public purpose" evolved as a specific Constitutional limitation on the power to tax and spend funds derived from taxation. *Lowell* v. *Boston,* 111 Mass. 454 (1873); *People ex rel. Detroit & H.R.R.* v. *Township Bd. of Salem,* 20 Mich. 452

(1870). It became well settled that an exercise of the taxing and spending powers in aid of a private industrial enterprise was not for a public purpose. See Cooley, *Taxation*, §176, at 386 (4th ed. 1924).

2. AN EXERCISE OF THE TAXING AND SPENDING POWER IN AID OF PRIVATE INDUSTRIAL ENTERPRISE IS NOT A PUBLIC PURPOSE.

Courts have consistently held that an attempt by a State to induce industrial location by offering an industry a sum of money or by conveying to it a building site for less than full value, is not a public purpose. *Citizen Savings and Loan Association* v. *City of Topeka*, 87 U.S. (20 Wall.) 655, 22 L. Ed. 455 (1875); *Commercial National Bank* v. *Iola*, 154 U.S. 617, 14 S. Ct. 1196, 22 L. Ed. 463 (1875); *Cole* v. *La Grange*, 113 U.S. 1, 5 S. Ct. 416, 28 L. Ed. 896 (1885); *Bissell* v. *City of Kankakee*, 64 Ill. 249 (1872); *Clee* v. *Sanders*, 42 N.W. 154 (1889); *Village of Suring* v. *Suring State Bank*, 207 N.W. 944 (1926); *City of Kiel* v. *Frank Shoe Mfg. Co.*, 4 N.W. 2d 17 (1942); *Wendlandt* v. *Hartford Acc. & Indem. Co.*, 268 N.W. 230 (1936). Even where there was no outright gift, but the State sold the property at a price substantially less than fair market value, the courts have held it not to be for a public purpose. *Herman* v. *City of Lake Mills*, 82 N.W. 2d 167 (1957).

The case of *Citizens Savings and Loan Association* v. *City of Topeka*, though aged, has never been overruled. Petitioner submits that *Topeka* and its progeny reiterate specific constitutional limitations (understood by the founding fathers) on the power of the legislative branch of State government in the exercise of its taxing and spending power. Specifically, said power may not be exercised for other than a public purpose.

In the *Topeka* case, on facts strikingly similar to those in the case at bar, the City of Topeka, Kansas, issued bonds

in the name of an iron works manufacturer "to aid and encourage that company in establishing and operating bridge shops in said city of *Topeka*" pursuant to an act of the Kansas State Legislature. *Topeka*, 87 U.S. (20 Wall.) at 656, 22 L. Ed. at 459. The City issued 100 bonds of $1,000.00 each to raise capital for the iron manufacturer, and then paid the interest on the bonds for the iron plant out of a fund of public tax money. *Topeka*, 87 U.S. (20 Wall.) at 656, 22 L. Ed. at 459. The purchaser of those bonds brought suit against the City when the City was unable to make the interest payments on the bonds. The City defended against the suit by claiming that the bonds were issued in violation of the constitutional competency of the Kansas legislature. This Honorable Court held that the Act of the Kansas legislature authorizing the issuance of the bonds as a loan of credit to a private manufacturer was unconstitutional as a taking of property under the guise of taxation in aid of an enterprise which was not of a public character. This Honorable Court held such an act to be a perversion of the right of taxation, as an aid to individual interests and personal purposes of profit and gain, and not for a public use. *Topeka*, 87 U.S. (20 Wall.) at 659, 22 L. Ed. at 460. In so, holding, this Honorable Court, through Mr. Justice Miller, stated:

> [I]n the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the

> steamboat owner are equally deserving of the aid of the citizens by *forced contributions.* (Emphasis added)

Topeka, 87 U.S. (20 Wall.) at 665, 22 L. Ed. at 462.

This Court in *Topeka* expressly found that the Constitution of the United States places a specific limitation on the authority of the States to tax and spend for other than a public purpose.[5] The following excerpts from Mr. Justice Miller's opinion are representative of this point:

> It must be conceded that there are such rights in every free government beyond the control of the State . . . The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere.

Topeka, 87 U.S. (20 Wall.) at 662, 22 L. Ed. at 461.

* * * * * *

> We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose . . . A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed to sustain us in this proposition. (citations omitted).

Topeka, 87 U.S. (20 Wall.) at 664, 22 L. Ed. at 461.

In *Topeka* and its progeny, this Honorable Court held that the Constitution of the United States, both implicitly and explicitly, places specific limitations on the power of the legislative branch of the State government to tax and spend, and that such power may only be exercised for a public purpose. In *Everson* v. *Board of Education of Ewing Township*, 330 U.S. at 6, 67 S. Ct. at 507, 91 L. Ed. at 718 (1947), this Court stated, "[I]t is true that this court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. (citing *Topeka*)." In

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[5]This Honorable Court in *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239, 25 S. Ct. 251, 49 L. Ed. 462 (1905) remarked that *Topeka* was decided on Fourteenth Amendment grounds.

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495, 514, 57 S. Ct. 868, 874, 81 L. Ed. 1245, 1256 (1937), this Court stated, "[I]t is not denied that since the adoption of the Fourteenth Amendment state taxing only can be exerted to effect a public purpose and does not embrace the raising of revenue for private purposes (citing *Topeka*)." In *Davidson* v. *Board of New Orleans*, 96 U.S. 97, 105, 24 L. Ed. 616, 620 (1877), this Court stated, "[I]f private property was taken for public uses without just compensation . . . [i]t may possibly violate some of those principles of general constitutional law, which, if we were sitting in review of a circuit court of the United States, as we were in the *Topeka* case, we could take jurisdiction of (citation omitted)." See also *Cole* v. *City of La Grange*, 113 U.S. 1, 5 S. Ct. 416, 28 L. Ed. 876 (1885); *Commercial National Bank* v. *Iola*, 154 U.S. 617, 14 S. Ct. 1199, 22 L. Ed. 463 (1875).

Admittedly, in several of the aforesaid cases, this Court went on to find a public purpose under the specific facts therein being addressed, yet in each and every one it, nevertheless, re-affirmed the undisputable principal that **the Constitution of the United States places a specific limitation on the taxing and spending power of a State legislature.**

The Petitioner therefore clearly met the second nexus of *Flast* taxpayer standing, i.e., he has alleged that the action of the Kentucky General Assembly in financing the Toyota Motor Corporation project was taken pursuant to its taxing and spending power, and that such action was in violation of a specific proscription embodied in the Constitution of the United States.

III. A Challenge by a Taxpayer Is the Only Means by Which an Appropriation to Amortize State Industrial Revenue Bonds May Ever be Constitutionally Scrutinized

This Honorable Court over the years has emphasized

and reemphasized the salient threshold standard to federal jurisdiction under Article III of the Constitution of the United States, i.e., that federal jurisdiction is limited to the resolution of "cases" and "controversies," and, that the "constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the **necessity** 'to adjudge the legal rights of litigants in actual controversies' ". (Emphasis added) *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. at 471, 120 S. Ct. at 757-8, 70 L. Ed. 2d at 708, quoting, *Liverpool S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39, 5 S. Ct. 352, 355, 28 L. Ed. 899 (1885). Mr. Chief Justice John Marshall was a great apostle of "judicial restraint." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) And, this Honorable Court has often reminded litigants of Marshall's great reticence to interpose the federal judiciary in otherwise "political questions" or to allow it to render "advisory opinions." *United States* v. *Richardson*, 418 U.S. at 171, 94 S. Ct. at 2943, 41 L. Ed. 2d at 685 (1974); *Frothingham* v. *Mellon*, 262 U.S. at 488, 43 S. Ct. 597, 67 L. Ed. 1085 (1923).

Marshall, however, also recognized that if the judiciary, as a matter of course, stayed its hand in deference to the legislature, it would give the legislature "a practical and real omnipotence." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) Thus, this Honorable Court historically has tempered its concern for "judicial restraint" where federal judicial power is invoked by a party as "a tool of last resort." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. at 473-4, 102 S. Ct. 759, 70 L. Ed. 2d at 710.

In the cause *sub judice*, Petitioner, as a resident, citizen and taxpayer of the Commonwealth of Kentucky, challenges a statute enacted under the taxing and spending authority

of the State legislature as violative of Article I, §10 and the Fifth and Fourteenth Amendments to the Constitution of the United States and this Honorable Court's specific pronouncement in *Citizens Savings & Loan Association* v. *City of Topeka*, 87 U.S. (20 Wall) 655, 22 L. Ed. 455 (1875).

A State industrial revenue bond issue and the appropriation of monies by the State legislature to retire the debt thereon cannot be challenged any other way than through an action brought by a taxpayer. No taxpayer could present an "actual injury" to himself or herself by the appropriation of funds raised through taxation for the amortization of industrial revenue bonds (save for the taking of his or her taxes for the benefit of the for-profit business of another citizen) as is being demanded by the United States Court of Appeals for the Sixth Circuit.

For this Honorable Court not to grant the Petition here would allow the State legislature to stand in a position of "practical and real omnipotence" insofar as the Constitution of the United States is concerned. For the Court to require some "distinct and palpable injury" to the Petitioner to be shown in the cause *sub judice* completely insulates such State appropriations from constitutional challenge in a federal court.

IV. There Exists a Conflict Among the Circuits as to the Availability of Taxpayer Standing in Federal Constitutional Challenges to Appropriations of Monies by State Legislatures

Clearly, as enunciated by the United States Court of Appeals for the Sixth Circuit, there exists a conflict among the United States Circuit Courts of Appeals with respect to the application of the doctrine of taxpayer standing where a plaintiff challenges the constitutionality of a State enactment appropriating monies for an allegedly unlawful purpose. Wrote the Sixth Circuit, through Chief Judge Lively:

> We respectfully disagree with the court's conclusion in *Hoohuli* v. *Arigoshi*, 741 F. 2d 1169 (9th Cir., 1984). The court in *Hoohuli* found that "[t]he pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes," and that this satisfied the *Doremus* requirement. *Id.* at 1180. We believe more is required. A state taxpayer—plaintiff must tie such allegations of illegal appropriations and expenditures to a specific claim of some direct and palpable injury threatened or suffered. *Doremus* did not eliminate the requirement; in fact, the Court in *Doremus* emphasized it by quoting *Frothingham* concerning direct injury and the requirement that a taxpayer-plaintiff allege more than "merely that he suffers in some indefinite way in common with people generally." 342 U.S. 434, 72 S. Ct. at 396.
>
> We agree with the dissent in *Hoohuli*.

842 F. 2d at 918-19.

The Ninth Circuit, in *Hoohuli*, claimed that *Flast* only drew upon the law in *Doremus* v. *Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952) for purposes of establishing the first nexus for **federal** taxpayer standing, i.e., "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, 8 of the Constitution." *Hoohuli* at 1179. *Flast*, according to the Ninth Circuit, did not discuss *Doremus* in connection with the second nexus for **federal** taxpayer standing. That fact was important in that it underscored the meaning behind the rule of law in *Doremus*. As stated hereinabove, *Doremus* stands for the proposition that if a plaintiff—like the plaintiff in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)—"showed [in his or her complaint] a measurable appropriation or disbursement of [state] funds occasioned solely by the activities complained of [state taxpayer] standing would be

found to exist." *Doremus,* 342 U.S. at 434, 72 S. Ct. at 397, 96 L. Ed. at 480. Accordingly, the Ninth Circuit held:

> We find implicit in this a continued distinction between standing requirements for state and federal taxpayers. *Flast* does not appear to have affected the availability of standing for state taxpayers challenging state statutes.

Hoohuli v. *Ariyoshi,* 741 F. 2d 1169, 1179 (1984).

That understanding of law of **State** taxpayer standing of the Ninth Circuit in *Hoohuli* is also the understanding of the law of **State** taxpayer standing held by the United States Court of Appeals for the District of Columbia. *Public Citizen, Inc.* v. *Simon,* 539 F. 2d 211, 218 n. 30 (D.C. Cir., 1976).

The Sixth Circuit, obviously regards *Flast* and the progeny of *Flast*—even those addressing purely executive actions—as having narrowed taxpayer standing to challenge **State** legislative enactments to only those where the challenges arise under the Establishment Clause of the First Amendment to the Constitution of the United States. 842 F. 2d at 918. Such is clearly at odds with the pronouncements of at least two sister circuits, and the pronouncements of this Honorable Court.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
SEE, SIXTH CIRCUIT RULE 24

No. 87-5245

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GORDON TAUB, - - - - *Plaintiff-Appellant,*

v.

COMMONWEALTH OF KENTUCKY, and
MARTHA LAYNE COLLINS, in her official capacity as Governor of the Commonwealth of Kentucky, et al., - - - - *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed March 29, 1988

Before: LIVELY, Chief Judge; JONES and GUY, Circuit Judges.

LIVELY, Chief Judge. The question in this case is whether a state taxpayer has standing to bring a suit in federal court to enjoin a state, its governor, and other executive officers from expending state tax revenues for allegedly unconstitutional purposes. After considering cross-motions with supporting documents, and briefs and oral arguments of counsel, the district court entered judgment dismissing the taxpayer's action without prejudice. Since we agree that the plaintiff lacks standing, we affirm.

I.

The facts are not in dispute. During the administration of the defendant Martha Layne Collins, former Governor of Kentucky, Toyota Motor Corporation (Toyota) determined to build a large automotive assembly plant in Scott County, Kentucky. As part of negotiations leading to this decision, Kentucky and Toyota entered into a contract by which the Commonwealth agreed to acquire land for the plant and to expend, or make available to Toyota, an amount not exceeding $20,000,000 for site preparation, engineering and improvements. The total cost to the Commonwealth was estimated at $35,000,000, and the improved site was to be conveyed to a designated affiliate of Toyota in fee simple at no cost. In return, Toyota agreed to construct an assembly plant at a cost of approximately $800,000,000 that would employ approximately 3,000 people.

The agreement provided that appropriate legislation would be submitted to the Kentucky General Assembly authorizing financing of the site acquisition and improvements by the issuance of revenue bonds of the Commonwealth. The agreement contemplated that the revenue bonds would be retired from "incremental taxes," defined as property taxes on the site, state corporate income taxes, state income taxes on employees at the Toyota plant, and other revenues received by the Commonwealth that exceeded taxes collected by the Commonwealth with respect to the project site in the fiscal year immediately preceding that in which construction of the facility commenced.

The required legislation was adopted by the General Assembly at its regular 1986 session, and the revenue bonds were issued and sold. The legislation provided as a condition precedent to the transfer of land to Toyota that the State Property and Buildings Commission make findings that the project was economically feasible and desirable. This requirement was satisfied by a study which calculated

the incremental taxes resulting from the Toyota plant at approximately $13,200,000 per year. Following conveyance of the improved real property. Toyota began construction of the assembly plant.

II.

The plaintiff is not a resident of Kentucky. However, he purchased land in the vicinity of the site in January 1986, when the general location of the Toyota plant was known, and in March and June 1986. He paid approximately $1200 in taxes on his Scott County property in 1986.

In his complaint, filed on August 17, 1986, plaintiff described the case as "a civil action arising under the Constitution of the United States," and based jurisdiction on 28 U.S.C. § 1331. The complaint alleged that the legislation authorizing the financing of the Toyota land purchase and improvements through state revenue bonds "and certain appropriations made for the benefit of Toyota" are unconstitutional as violating Article I, Section 10, and the Fifth and Fourteenth Amendments. The complaint sought a declaratory judgment that the legislation and appropriations are unconstitutional "on their face," and a permanent injunction prohibiting enforcement of the legislation and expenditure of any appropriations to amortize or pay debt service on the Toyota revenue bonds.

In connection with the Toyota project the Commonwealth condemned a right of way through a portion of the plaintiff's land. However, the complaint made it clear that the plaintiff does not base this lawsuit on his status as a condemnee, but that he "brings the within action alleging the unconstitutionality of the exercise of the power of the Commonwealth of Kentucky and its agencies and officers to tax and spend monies raised by taxation under specific federal constitutional prohibitions, as a taxpayer of the Commonwealth of Kentucky." Later in the complaint he identified the constitutional basis of his claim by alleging that the

action of the Commonwealth and various officials of the executive branch "amount to the taking of private property through taxation for other than a public purpose." At oral argument on the motions in the district court, counsel for the plaintiff acknowledged that he could not show any actual economic injury in the form of past or probable future tax increases.

III.

Most of the case law pertains to standing of federal taxpayers, suing solely in that capacity, to seek injunctions against appropriations and expenditures of federal tax revenues. The seminal decision, *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), held that a taxpayer has no standing to sue for an injunction to prevent federal officials from enforcing a federal statute authorizing appropriations of public money. The taxpayer's claim appeared to be that "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law." *Id.* at 486. In denying standing, the Court stated:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement,

> and not merely that he suffers in some indefinite way in common with people generally.

Id. at 488.

The courthouse door remained tightly shut for federal taxpayer suits until the Supreme Court decided *Flast* v. *Cohen*, 392 U.S. 83 (1968). Noting the "impenetrable barrier" erected by *Frothingham*, Chief Justice Warren stated the issue in *Flast* as "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Id.* at 85. The Court then undertook a "fresh examination" of limitations on standing to sue in federal court and how those limitations apply to taxpayer suits. *Id.* at 94.

The *Flast* Court emphasized that the focus in a standing dispute is on the person seeking to sue in federal court rather than on the issues that person seeks to litigate. *Id.* at 99. The Court then sought to determine "the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III" (the "cases and controversies" requirement). *Id.* at 101. While emphasizing that justiciability of the substantive issues is not involved, the Court stated that it is appropriate to look at the substantive issues sought to be adjudicated in ruling on standing "to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. The Court concluded that whether a person suing solely as a federal taxpayer has standing to challenge the constitutionality of a federal spending program depends on whether the plaintiff can demonstrate the necessary stake as a taxpayer in the outcome of the litigation to satisfy the requirements of Article III. *Id.*

Applying two aspects of a "nexus" test, the Court determined that a federal taxpayer seeking to prevent the expenditure of federal revenues for activities that violate the Establishment Clause does have standing. The first aspect of the nexus test requires the taxpayer to establish a "logical link" between the status of taxpayer and the type of legislation he seeks to avoid. Under this test "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Id.* The second aspect requires the taxpayer to show that the challenged legislation exceeds specific constitutional limitations imposed on the taxing and spending powers of Congress, "and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id.* at 103. As applied to the complaint in *Flast,* the first nexus test was satisfied because the constitutional challenge was "to an exercise by Congress of its power under Art. 1, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds." *Id.* The second nexus test was satisfied by the allegation that the congressional enactment in question violated the command of the First Amendment that Congress "make no law respecting an establishment of religion," a specific limitation on Congress' taxing and spending power. The *Flast* Court concluded that the result in *Frothingham* was consistent with the two-part nexus test because the plaintiff in that case had satisfied the first nexus requirement by attacking a federal spending program, but had failed to establish the second step because she had not alleged that Congress violated a specific limitation on its taxing and spending power in enacting the Maternity Act. *Id.* at 104-05.

Although *Flast* v. *Cohen* appears to create a fairly narrow exception to the *Frothingham* rule, and may apply only to Establishment Clause cases (see concurring opin-

ions of Justices Stewart and Fortas, 392 U.S. at 114 & 115), we have discussed it at some length because it clearly has influenced all federal taxpayer standing cases since its release. *E.g.*, *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

More recently the Supreme Court has illustrated the narrowness of the *Flast* exception by finding that even a taxpayer who relied on an asserted violation of the Establishment Clause lacked standing. In *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982), individual taxpayers sought to nullify the gift of surplus government property to a denominational college. Before addressing the specific case before it, the Court emphasized the Article III requirement of a "distinct and palpable injury" which must underlie every claim of standing to sue in federal court, describing this requirement as "a limitation on judicial power." *Id.* at 475. It contrasted such claims with those of " 'generalized grievances,' pervasively shared and most appropriately addressed to the representative branches." *Id.* (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975)).

The Court then found that the plaintiffs did not satisfy the first aspect of the *Flast* test because they attacked an action of the executive branch, not of Congress, and thus did not implicate the taxing and spending power. The Court also found that the plaintiffs had not alleged a sufficiently distinct and palpable injury to confer standing. The Court stated that the plaintiffs had not alleged "an *injury* of *any* kind, economic or otherwise, sufficient to confer standing," and added that plaintiffs' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not con-

stituted as ombudsmen of the general welfare." *Id.* at 486-87.

Although not a taxpayer suit, *Allen* v. *Wright*, 468 U.S. 737 (1984), must be taken into account as the Supreme Court's latest treatment of standing to sue in a federal court. In *Allen* parents of black school children sued to enjoin officials of the Internal Revenue Service from granting tax-exempt status to racially segregated private schools. The plaintiffs alleged that the practice of granting the exemptions to such schools harmed them directly and interfered with their children's opportunity to receive an education in desegregated public schools. The Court found that neither allegation of injury was sufficient to confer standing. The Court emphasized that the constitutional limitations on standing to sue in federal courts derive from the principle of separation of powers, stating that doctrines developed to elaborate upon the cases and controversies requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Id.* at 750 (quoting *Warth* v. *Selden*, 422 U.S. at 498). Thus, the proper role of the courts in a scheme of government based in part on the separation of powers principle is preserved by a requirement, as a prerequisite to standing, that a person demonstrate a distinct and palpable injury that is personal to the would-be litigant. On the other hand, the Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Id.* at 754.

Allen v. *Wright* echoes the concerns expressed by Justice Powell, concurring in *United States* v. *Richardson*:

> Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a

> democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.

418 U.S. at 188 (footnote omitted).

IV.

There are very few decisions concerning standing of state taxpayers to sue in federal court where the Establishment Clause is not an issue. This is not the case with respect to municipal taxpayers. In *Frothingham* itself the Court stated that an injunction is appropriate to prevent misuse of municipal funds because the interest of a municipal taxpayer in the application of such funds is "direct and immediate." 262 U.S. at 486. After reaching this conclusion, the Court distinguished the interest of a federal taxpayer:

> But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.
>
> The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is

> indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.

Id. at 487.

This court has recognized municipal taxpayer standing in a variety of cases. *E.g., Hawley* v. *City of Cleveland*, 773 F. 2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986) (municipal taxpayers had standing to challenge city's rental of space in a municipal airport to a religious organization for use as a chapel at less than market value); *Gwinn Area Community Schools* v. *State of Michigan*, 741 F. 2d 840 (6th Cir. 1984) (taxpayers of a school district had standing to challenge a formula for allocating federal impact funds that the plaintiffs alleged unduly shifted the tax burden to them). However, we have not previously addressed the issue of state taxpayer standing. Although the plaintiffs in *Americans United for Separation of Church and State* v. *School District of Grand Rapids*, 718 F. 2d 1389 (6th Cir. 1983), *aff'd sub nom. Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985), challenged a state-authorized shared time program in the Grand Rapids schools, they sued as taxpayers of the school district as well as of the State. Further, the case involved a challenge under the Establishment Clause, and the Supreme Court noted numerous cases in which it has "adjudicated Establishment Clause challenges by state taxpayers to programs for aid-

ing nonpublic schools." 473 U.S. at 380 n. 5. This observation points up the distinctive treatment of standing when the Establishment Clause is involved, but does not indicate any rule with respect to other state taxpayer suits.

Doremus v. *Board of Education*, 342 U.S. 429 (1952), was a state taxpayer action which antedated *Flast* v. *Cohen* and involved an Establishment Clause claim. The plaintiffs sued as citizens and taxpayers of New Jersey and one of its townships and a borough. They sought a declaratory judgment that a New Jersey statute providing for Bible reading at the opening of each public school day was unconstitutional. The case was brought in state court and reached the Supreme Court as an appeal from the Supreme Court of New Jersey, which had decided the case on its merits. The Supreme Court concluded, however, that it lacked jurisdiction because the plaintiffs had failed to allege any direct injury to themselves. Relying upon, and quoting from, *Frothingham*, the Court stated:

> Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Id. at 434. The Court determined that the "case or controversy" requirement of Article III limits the jurisdiction of federal courts to taxpayer suits that are "good-faith pocketbook action[s]." *Id.* Thus, the Court applied the *Frothingham* requirement that a taxpayer allege a direct injury as a prerequisite for standing when either state or federal use of public funds is challenged in federal court.

The Supreme Court decided one state taxpayer suit not involving the Establishment Clause between *Frothingham* and *Flast*. In *Williams* v. *Riley*, 280 U.S. 78 (1929), state taxpayers sought an injunction in federal court to prohibit the enforcement of California's motor vehicle fuel tax laws that imposed a tax of three cents per gallon on gasoline. The plaintiffs' theory was that the effect of the statutes was to deprive all purchasers of gasoline of property without due process of law. In denying standing, the Court relied directly on *Frothingham*, quoting from that decision as follows:

> *Frothingham* v. *Mellon, Sec'y of the Treasury*, 262 U.S. 447, 487, 488, announces the applicable doctrine.
>
> "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern."
>
> The federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the federal or state constitutions. "That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."

Id. at 80.

V.

We conclude that the requirements for federal taxpayer standing announced in *Frothingham* control the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged. The rule upholding municipal taxpayer standing appears to rest on the assumption that the relatively small number of taxpayers involved and the close relationship between resi-

dents of a municipality and their local government results in a direct and palpable injury whenever tax revenues are misused. Whatever the validity of that assumption with respect to the largest cities today, we believe it has no force when a state is the defendant and the plaintiffs sue as state taxpayers. In order to have standing, a state taxpayer must allege direct and palpable injury with sufficient specificity to meet the "good-faith pocketbook" requirement of *Doremus*.

We respectfully disagree with the court's conclusion in *Hoohuli* v. *Ariyoshi*, 741 F. 2d 1169 (9th Cir. 1984). The court in *Hoohuli* found that "[t]he pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes," and that this satisfied the *Doremus* requirement. *Id.* at 1180. We believe more is required. A state taxpayer-plaintiff must tie such allegations of illegal appropriations and expenditures to a specific claim of some direct and palpable injury threatened or suffered. *Doremus* did not eliminate this requirement; in fact, the Court in *Doremus* emphasized it by quoting *Frothingham* concerning direct injury and the requirement that a taxpayer-plaintiff allege more than "merely that he suffers in some indefinite way in common with people generally." 342 U.S. at 434.

We agree with the dissent in *Hoohuli*. As recent Supreme Court decisions have made clear, the restrictions on federal taxpayer standing prevent unwarranted intrusions by the courts into matters entrusted to the legislative and executive branches of the federal government. This separation of powers concern has a counterpoint which should be considered when a state taxpayer seeks to have a federal court enjoin the appropriation and spending activities of a state government. Considerations of federalism should signal the same caution in these circumstances as concern for preservation of the proper separation of powers in an

"all federal" action. Judge Wallace stated our concern quite clearly in his dissenting opinion in *Hoohuli:*

> *Doremus* requires a state taxpayer plaintiff to demonstrate "a good-faith pocketbook action," 342 U.S. at 434, 72 S. Ct. at 397, which appears to parallel the core article III injury-in-fact requirement. *See Allen*, ___ U.S. at ___, 104 S. Ct. at 3324. But when State taxpayers attack state spending in federal court, another major consideration operates: the integrity of our government's federalist structure. Unnecessary or abstract decisions by federal courts in cases where there is no case or controversy could unduly constrict experimental state welfare legislation and undermine local self-determination.

741 F. 2d at 1183.

In his complaint in the present case the plaintiff described the defendant, Commonwealth of Kentucky, as "a sovereign State of the United States." Congress has recognized that a state's power of taxation is a basic attribute of sovereignty by enacting the Tax Injunction Act, 28 U.S.C. § 1341 (1982). A sovereign must have the authority to determine how tax revenues are to be spent, or the power to tax is illusory. Thus, state sovereignty extends to the total conduct of a state's fiscal affairs. As the court stated in *Dawson* v. *Childs*, 665 F. 2d 705, 709 (5th Cir. 1982):

> Under our federalist system, the state governments no less than the federal government possess certain unalienable powers that the other may not encroach upon. *See generally National League of Cities* v. *Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976). Of all such areas, the field of state taxation is perhaps the most important. The Supreme Court early recognized the need for judicial restraint in matters involving a state's fiscal affairs. *First National Bank* v.

Board of County Commissioners, 264 U.S. 450, 44 S. Ct. 385, 68 L. Ed. 784 (1924).

In this case the plaintiff presented a generalized claim of injury, admitting that he was neither threatened with nor had suffered a direct and individual injury not shared by all taxpayers of Kentucky. His allegations were not sufficient to permit him to pursue a federal court injunction. Whatever the merits of his claim, and their justiciability in a state forum, he lacks standing to bring this action.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

FOR THE SIXTH CIRCUIT

No. 87-5245

GORDON TAUB, - - - - *Plaintiff-Appellant,*

v.

COMMONWEALTH OF KENTUCKY and
MARTHA LAYNE COLLINS, in her capacity as
Governor of the Commonwealth of Kentucky, et al., - - - - *Defendants-Appellees.*

JUDGMENT—Filed April 29, 1988

Before: LIVELY, Chief Judge; JONES and GUY, Circuit Judges.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
(s) John P. Hehman, Clerk

A True Copy.
Attest:

(s) Cheryl Borkowski, Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 86-95

GORDON TAUB - - - - - - - - *Plaintiff*

v.

COMMONWEALTH OF KENTUCKY, ET AL. - *Defendants*

OPINION—Filed February 20, 1987

In this action the plaintiff, Gordon Taub, seeks to enjoin the Commonwealth of Kentucky (Commonwealth) and its various Cabinets from making certain grants and concessions to Toyota Motor Corporation (Toyota) to induce it to build and operate a large automobile manufacturing plant near Georgetown, Kentucky.

Among the inducements to be provided to Toyota by the Commonwealth is a large site for its factory, which is to be obtained by the Commonwealth from private citizens through its power of eminent domain and donated to Toyota. This site alone has a value of several million dollars. Other inducements include the Commonwealth's promise to conduct all site preparation for the new factory and to finance the training of Toyota employees.

Taub is not a citizen of Kentucky but does own real property near the proposed plant site. Although part of this property has been designated to be taken by eminent domain for a road that will provide access to the Toyota plant, Taub asserts no standing as a landowner but only as a taxpayer.

Taub complains that the inducements the Commonwealth is providing for Toyota constitute an expenditure of public money for a non-public purpose. He claims that this violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. He relies on the ancient but never-overruled case of *Citizens Savings & Loan Assn.* v. *Topeka*, 87 U.S. (20 Wall.) 655 (1875).

As interesting as this "public purpose" issue may be, the court cannot consider it, since it has concluded that Taub lacks standing to bring this action. Therefore, this case must be dismissed for lack of jurisdiction.

Until the oral argument on various motions to dismiss, it was not clear that Taub was not asserting any rights as a landowner. When pressed by the court, however, Taub's counsel admitted that standing was claimed only as a taxpayer. When pressed further as to whether Taub could show any actual economic injury in the form of a past or probable future tax increase, counsel admitted that he could not and claimed no actual injury. This was apparently because Taub's annual tax bill was only $1,200.00 and if the Commonwealth's economic projections are correct, the result of its inducing Toyota to locate a plant here will cause it to reap so many benefits in the form of increased tax revenues that Taub and the rest of us will pay less taxes. Therefore, not only can Taub not show an economic detriment from these expenditures, it is equally or more likely that he will derive an economic benefit. At least he admits he can make no showing to the contrary.

Taub, however, presents himself to the court as a fiscal conservative to whom public expenditures of the kind to be made here are anathema. He does not believe that government has any business expending taxpayers' money on direct grants to private enterprises, no matter how laudatory the motives.

In an attempt to establish standing to bring this action, Taub relies on the decision of the Supreme Court of the

United States in *Flast* v. *Cohen*, 392 U.S. 83 (1968). There, the Supreme Court attempted to lay down some definitive rules for the thorny problem of taxpayer standing. *Flast* was a federal taxpayers' action, in which appropriations of funds for the aid of religious schools were attacked. Relaxing its previous stringent rule that federal taxpayers could never establish standing to challenge the expenditure of federal funds, the Court provided a new two-pronged test:

> "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment *exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I*, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." (Emphasis Added)

Flast v. *Cohen*, 392 U.S. at 102.

It is undisputed that Taub has pled this first nexus. He is alleging the unconstitutionality of the exercise of the Commonwealth's taxing and spending powers as enumerated in the Kentucky Constitution.

> " **§171. State tax to be levied—Taxes to be levied and collected for public purposes only and by general laws, and to be uniform within classes—Classification of property for taxation—Bonds exempt—Referendum on act classifying property.**—The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

In their moving papers, the defendants in this case argued that Taub failed to establish the second nexus of the *Flast* test. While the defendants dropped this contention in oral argument, the court must take it up as the contention goes to the court's jurisdiction under Article III.

The second nexus requires that the taxpayer show that the laws challenged exceed "specific constitutional limitations imposed upon the exercise of the . . . taxing and spending powers and not simply that the enactment is generally beyond the powers" of political branches of government. *Flast* at 103. Taub now argues that the fact that he is challenging an appropriations law, is enough to meet the second prong of *Flast*. This analysis confuses the first nexus with the second.

The Supreme Court noted in *Flast* itself that the reason the *Flast* plaintiffs had met the second nexus was because they "alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment." The Court continued:

> "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."

In *Flast,* the taxpayers alleged that Congress was using its power under the taxing and spending clause (nexus number one) to pay for text books and instructors at religious and sectarian schools (nexus number two). In the instant case, Taub is alleging that the Kentucky legislature passed a series of tax laws (nexus number one) which violate the due process clause of the United States Constitution because the revenues are not used for a public purpose.

Taub's case more closely resembles that of Mrs. Frothingham in *Frothingham* v. *Mellon*, 262 U. S. 447 (1923). Mrs. Frothingham also sued as a taxpayer to attack a taxing and spending program. Like Taub, therefore, she met the first prong of *Flast.* Also like Taub, Mrs. Frothingham made the allegation that the government was depriving her of her rights under the Due Process Clause of the Fifth Amendment by potentially increasing her tax burden. The *Flast* Court noted that Mrs. Frothingham did not show the second nexus of the *Flast* test.

> "[T]he Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability, and the taxpayer in *Frothingham* failed to make any additional claim that the harm she alleged resulted from a breach by Congress of the specific constitutional limitations imposed upon an exercise of the taking and spending powers."

Flast at 105.

Like Mrs. Frothingham, Taub is seeking "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government. . . ." *Flast*

at 106. Taub has not met the second nexus of *Flast*. He is arguing that the Toyota expenditures are generally beyond the powers of the political branches of government.

One writer has expressed the view that *Flast* is "essentially" a dead letter, limited to its facts in the light of later decisions.[1] But since *Flast* is the sole authority relied on by the plaintiff, and he does not meet *Flast*, he would seem to be barred without further ado.

If, however, *Flast* has been merged in later standing decisions, it is even clearer that plaintiff is barred under those later decisions.

Allen v. *Wright*, 104 S. Ct. 3315 (1984), was a case in which a plaintiff class of black parents with school aged children challenged federal tax exemptions that had been granted to private schools that the parents alleged to be racially discriminatory. It is not clear whether the *Allen* plaintiffs sued as taxpayers or merely as citizens. These parents alleged that (1) they were deeply offended by their government's condoning and subsidizing these schools' discriminatory practices and (2) that this subsidization was in effect retarding the desegregation of other schools.

The Court held the parents lacked standing. It held that, absent direct injury, standing could not be based on the offensiveness of the challenged practices, however justified plaintiffs' outrage might be. With regard to plaintiffs' second contention, the Court held causation was too speculative.

Any distinction between the position of the *Flast* and *Allen* plaintiffs seems highly technical. What is clear is that the Court in *Allen* evidenced an intention to apply standing principles strictly thereafter.

In *Allen*, "the Court took a sharply restrictive view of Article III" in its restatement of the standing doctrine. 98 Harv. L. Rev. at 237.

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[1] "*More Than an Intuition, Less Than a Theory*": *Toward a Coherent Doctrine of Standing*, 86 Colum. L. Rev. 564, 566 (1986).

First of all, Justice O'Connor pointed out that the standing doctrine is an essential corollary to Article III of the Constitution, the judicial article. It, along with the rules concerning mootness, ripeness, political question and advisory opinions, are essential to implementation of the requirement that the federal courts decide only actual "cases and controversies" as mandated by Article III. 104 S. Ct. at 3324.

Synthesizing many cases,[2] Justice O'Connor enumerated the following prerequisites to establishing standing in the federal courts:

1. personal injury fairly traceable to the defendant's conduct;
2. which injury is likely to be redressed by the requested relief;
3. the injury must be distinct and palpable;
4. and not abstract, conjectural or hypothetical.

A mere statement of these criteria shows that Taub meets none of them.

The *Allen* Court held that the black parents had no standing to attack the tax exemptions. In the course of the opinion, it further observed that "an asserted right to—have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." 104 S. Ct. at 3326.

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[2] *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979); *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1975); *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. 339 (1982); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *U.S.* v. *Richardson*, 418 U.S. 166 (1974); *Heckler* v. *Mathews*, 465 U.S. 728 (1984); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *U.S.* v. *Scrap*, 412 U.S. 669 (1973); *Laird* v. *Tatum*, 408 U.S. 1 (1972); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Coit* v. *Green*, 404 U.S. 997 (1971).

These words are fatal to Taub's position before this court. He admits he has suffered no economic injury from the challenged laws. His moral indignation could not be any greater than that of the black parents in *Allen*.

The recent decision of the United States Court of Appeals in *Hawley* v. *City of Cleveland*, 773 F. 2d 736 (6th Cir. 1985), is instructive. There certain city taxpayers complained of the leasing of space in the local public airport for use as a chapel. The court held that their moral indignation was sufficient to confer standing on them, because they actually used the airport and would either have to go out of the way to avoid the chapel, or would actually have to pass by it, being offended that a municipal facility was being used for sectarian purposes. Analyzing the Supreme Court cases discussed here together with many other authorities, the court expressed the view that the plaintiffs were required to show either an economic injury (which Taub admits he cannot do) or an individual non-economic injury "other than a mere psychological reaction." 773 F. 2d at 740.

Even if the record reflected that Taub visited the area and observed the Toyota plant, it would be stretching *Hawley, supra*, beyond the parameters fixed by *Allen* and the Supreme Court cases discussed in it to hold that this non-economic injury was more than "a mere psychological reaction." It is the contemplation of the state's cash flow statement rather than the physical plant itself which offends Taub. The plant does not have the "physical and metaphysical impact" of a large illuminated cross in a state park or a chapel in a municipal airport. Indeed, Taub says he has nothing against the Toyota plant, only the method of financing it.

Standing law at the present time is not entirely clear. Indeed, the Supreme Court has been harshly criticized by some commentators for failing to lay down intelligible

guidelines in this area.[3] It is clear to this court, however, that Taub desires to vindicate an abstract principle in which he has no personal stake, and under any construction of the cases, he lacks standing.

Therefore, the defendants' motion to dismiss must be granted.

A separate Judgment will be entered concurrently herewith, pursuant to F.R. Civ. P. 58.

This 20th day of February, 1987.

(s) William O. Bertelsman
William O. Bertelsman, Judge

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[3]Note, *Allen* v. *Wright: Standing Beyond the Bounds of Article III*, 63 N.C.L. Rev. 1015 (1985); Nichol, *Abusing Standing: A Comment on Allen* v. *Wright*, 133 U.Pa.L.Rev. 635 (1985); Note, *"More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing*, 86 Colum. L.Rev. 564 (1986); Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 Minn. L.Rev. 611 (1986).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

GORDON TAUB - - - - - - - - *Plaintff*

v.

COMMONWEALTH OF KENTUCKY, MARTHA LAYNE COLLINS, In official capacity as Governor of the Commonwealth of Kentucky, COMMERCE CABINET OF KENTUCKY, agency of government of the Commonwealth of Kentucky, FINANCE AND ADMINISTRATION CABINET OF KENTUCKY, agency of government of the Commonwealth of Kentucky, HUMAN RESOURCES CABINET OF KENTUCKY, agency of government of the Commonwealth of Kentucky, E. AUSTIN, JR., in official capacity as Secretary of Human Resources Cabinet of Kentucky, AND STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY, agency of government of the Commonwealth of Kentucky - - - - - - - - *Defendants*

JUDGMENT—Filed February 20, 1987

For the reasons stated in the Opinion filed concurrently herewith, the court being advised,

IT IS ORDERED AND ADJUDGED that the motion to dismiss of the defendants be, and it is, hereby GRANTED and that this action be, and it is, hereby DISMISSED, without prejudice, for lack of standing, at the cost of the plaintiff.

This 20th day of February, 1987.

(s) William O. Bertelsman
William O. Bertelsman, Judge

86 RS BR 2439/GA

[SEAL]

GENERAL ASSEMBLY

COMMONWEALTH OF KENTUCKY
REGULAR SESSION 1986

SENATE BILL No. 361

MONDAY, MARCH 10, 1986

The following bill was reported to the House from the Senate and ordered to be printed.

AN ACT relating to industrial development and authorizing the establishment and financing by the Commonwealth of Kentucky of projects designed to promote such development and declaring an emergency.

WHEREAS, it is the public policy of the Commonwealth of Kentucky to encourage, engender, promote and support economic development, new job formation, the retention of existing industry and the development and growth of industry and commerce in the Commonwealth, for the public purposes of alleviating and preventing unemployment, stabilizing and promoting the economy of Kentucky as the economy is transformed from agrarian to industrial, and creating new tax bases to increase the revenues of the Commonwealth and its agencies and subdivisions for the economic, educational and social benefit of the citizens and residents of the Commonwealth; and

WHEREAS, the general welfare and well-being of the citizens of the Commonwealth is inextricably connected with and related to the economic opportunities which may be created and made available to them, and it is the legitimate business of Kentucky state government in an increasingly complex society, to provide, to the maximum extent practicable, the impetus for economic development in the Commonwealth by the creation and financing of programs

which will directly and proximately cause the location and retention of industry in the Commonwealth; and

WHEREAS, it is essential to provide additional authority, procedures and techniques to enable the appropriate state agencies of Kentucky to induce and cause the location of major industry in the Commonwealth and to authorize the creation and financing of incentive programs for industry which will result in the creation of new employment opportunities for the citizens of the Commonwealth, the increase of the economic base of the Commonwealth, increased tax revenues to the Commonwealth and the general stabilization of the economy of Kentucky as it is transformed from agrarian to industrial, all of which are recognized as being vitally essential public purposes;

NOW, THEREFORE,

Be is enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 56 IS CREATED TO READ AS FOLLOWS:

(1) It is hereby found, determined and declared as a legislative finding of fact that the general welfare and well-being of the citizens of the Commonwealth is inextricably connected with and related to the economic opportunities which may be created and made available to them and that it is the legitimate business of Kentucky state government in an increasingly complex society to provide to the maximum extent practicable the impetus for economic development in the Commonwealth by the creation and financing of programs which will directly and proximately cause the location of major industries in the Commonwealth.

(2) It is hereby further found, determined and declared as a legislative finding of fact that the establishment of major manufacturing, processing and assembling facilities on sites which may be acquired and developed by the Com-

monwealth for such uses will proximately result in increased tax revenues to the Commonwealth, as taxing entity, including state corporate income taxes, state income taxes paid by employees who work in such facilities, state property taxes, state corporation license taxes and state sales and use taxes, which would not be received by the Commonwealth but for the establishment of such manufacturing, processing and assembling facilities and which tax receipts are hereby found, determined and declared to constitute receipt of value by the Commonwealth for the lease of conveyance of any such sites, as developed and improved, to persons, firms and corporations establishing major manufacturing, processing and assembling facilities on such sites.

(3) It is the purpose of this Act to promote the gainful employment, business and economic development opportunities and general welfare of the citizens and residents of the Commonwealth by the creation of authority to enable the Commonwealth to acquire real estate for use as manufacturing, processing and assembling sites, and to develop such sites for occupancy, use, lease or conveyance to industrial corporations, partnerships and other entities which will provide citizens and residents of the Commonwealth with employment opportunities and will provide to the Commonwealth additional tax revenues. The authority granted by this Act and the purposes to be accomplished by this Act are hereby declared to be public purposes for which public money may be expended. The general assembly hereby declares that financing the acquisition and development of sites for industries pursuant to this Act is governmental and public in nature.

Section 2. KRS 56.440 is amended to read as follows:

As used in this chapter, unless the context otherwise requires:

(1) "Commission" means the state property and buildings commission.

(2) "Real estate" includes lands together with improvements thereon and appurtenances thereto.

(3) "Building" includes any structure or improvement upon real estate of a permanent nature and additionally includes any sites, structures, equipment, machinery or devices for the purpose of establishing, developing or furthering television or related services in aid of education or in aid of any other proper public functions, whether or not the same would otherwise be legally defined as buildings; but only *(except for industrial development projects)* if used or to be used by the Commonwealth of Kentucky or one of its departments or agencies (not including independent municipal corporations or political subdivisions).

(4) "Building project" includes the construction, reconstruction and structural maintenance of buildings, the installation of utility services, including roads and sewers, and the purchase and installation of equipment, facilities and furnishings of a permanent nature for buildings, and the purchase and installation initially of movable equipment, furnishings and appurtenances necessary to make a building operable, and for television or related purposes as referred to in subsection (3) of this section, for use by the state government or one of its departments or agencies, not including any independent municipal corporation or political subdivision.

(5) *"Industrial development project" means and includes the acquisition of any real estate and the construction, acquisition and installation thereon and with respect thereto of improvements and facilities necessary and useful for the improvement of such real estate for conveyance to or lease to industrial entities to be used for manufacturing, processing or assembling purposes, including sur-*

veys, site tests and inspections, sub-surface site work, excavation, removal of structures, roadways, cemetaries and other surface obstructions, filling, grading and provision of drainage, storm water detention, installation of utilities such as water, sewer, sewage treatment, gas, electricity, communication and other similar facilities, off-site construction of utility extensions to the boundaries of such real estate, construction and installation of buildings including buildings to be used for worker training and education, rail facilities, roads, sidewalks, curbs, and other improvements to such real estate necessary to its manufacturing, processing or assembling use by industrial entities; provided that an industrial entity must have agreed with the commission, prior to the financing of an industrial development project, to develop, in conjunction with such industrial development project, manufacturing, processing or assembling facilities satisfactory to the commission.

(6) "Industrial entity" means any corporation, partnership, person or other legal entity, whether domestic or foreign, which will itself or through its subsidiaries and affiliates construct and develop a manufacturing, processing or assembling facility on the site of an industrial development project financed pursuant to this chapter.

(7) "Incremental taxes" means, for any fiscal year of the Commonwealth, that amount of money which is equal to all tax revenues received by the Commonwealth, as taxing entity, during such fiscal year in respect of an industrial development project and improvements and equipment thereon and the products thereof, and activities carried out by the occupants and users of such industrial development project, minus an amount equal to all tax revenues received by the Commonwealth, as taxing entity, in respect of the site of the industrial development project and the same type of taxable properties and activities during the fiscal year immediately preceding the fiscal year during

which construction of the improvements undertaken by an industrial entity as a result of financing of such industrial development project commenced. Incremental taxes shall include such tax revenues as state corporate income taxes, state income taxes paid by employes of manufacturing, processing and assembling facilities developed on the site of an industrial development project, state property taxes, state corporation license taxes and state sales and use taxes but shall not include any taxes levied specifically for educational purposes.

(8) "State agency" means any state administrative body, agency, department or division as defined in KRS 42.005, or any board, commission, institution, or division exercising any function of the state but which is not an independent municipal corporation or political subdivision.

(9)[(6)] "Cabinet" means the finance and administration cabinet.

Section 3. KRS 56.510 is amended to read as follows:

(1) In carrying out the purposes of KRS Chapter 56, and in providing for the expenditure of funds for the acquisition of real estate or for a building project for the state or for any state agency, the cabinet may find that the cost may be paid in whole or in part (a) out of the funds appropriated specifically for capital outlay purposes, or (b) out of funds directly appropriated to the involved state agency which may legally be available for the purpose, or (c) out of funds derived or which may be derived by the issuance and sale of revenue bonds by the commission (but only for the purpose of acquiring property for use by the state government or one of its departments or agencies, but not including any independent municipal corporation or political subdivision), or (d) by any one (1) or a combination of said methods of financing. Any such findings providing for the issuance and sale of bonds shall be submitted to the commission for final determination. When any funds

appropriated to or standing to the credit of a particular state agency are to be used for a purpose of the character above contemplated, the head of the agency may direct that the funds be transferred to the credit of the finance and administration cabinet and made available for expenditure by the finance and administration cabinet for the agreed purpose. *Industrial development projects may be financed by the issuance of revenue bonds of the commission only at the request of the commerce cabinet, subject to the provisions of subsection (3) of this section.*

(2) In any case where the expenditures for the acquisition of real estate or for a building project for the state or any state agency are to be financed in whole or in part by the issuance or sale of revenue bonds, the commission may provide that the title to any real estate which may be so acquired shall not vest in the Commonwealth until the revenue bonds, together with interest thereon, have been paid in full. In such cases the commission may, by agreement or in a trust indenture securing the payment of such revenue bonds, provide that the title of such real estate may be vested in some other state agency, or in a trustee named in such indenture, until the revenue bonds, together with the interest thereon, have been paid in full. It shall be provided in any such financing (i) that upon the retirement and discharge of the bonds, notes, or other obligations issued by the commission at the direction of and on behalf of a state agency, title to the public project or public projects so acquired shall vest in the Commonwealth; (ii) that in the event of default with respect to such bonds, notes, or other obligations, the Commonwealth shall have the exclusive option to acquire the public project or public projects for the amount required to discharge such bonds, notes, or other obligations, and is provided a reasonable time to exercise such option; (iii) that the issuance of such bonds, notes, or other obligations shall be directed by and approved by such state agency not more than sixty (60)

days prior to the date of issue of such obligations; and (iv) that no bonds, notes, or other obligations shall be issued by the commission for and on behalf of such state agency except upon express direction of such state agency.

(3) *(a) In any case where the expenditures for the acquisition, installation and construction of an industrial development project will be financed in whole or in part by the issuance or sale of revenue bonds, the commission may provide that the title to the industrial development project which may be so acquired shall be conveyed to the industrial entity which will occupy and utilize the industrial development project; provided, however, that such conveyance shall only be made if:*

1. The subject industrial entity agrees in writing prior to the issuance of any revenue bonds to construct and acquire in connection with the industrial development project manufacturing, processing and assembling facilities satisfactory to the commission;

2. The commission makes a finding in writing, that, based upon diligent investigation, the aggregate incremental taxes to be received by the Commonwealth as a result of such industrial development project are reasonably expected, over the life of the revenue bond issue, to be at least equal to the principal amount of any revenue bonds issued to finance such industrial development project;

3. The industrial development project is separately approved in writing by the governor;

4. The industrial development project is separately approved and authorized by the general assembly; and

5. Any revenue bond proceedings for the financing of an industrial development project provide that in the event of any disposition by an industrial entity of any such industrial development project previously conveyed to such industrial entity prior to the collection by the Commonwealth of incremental taxes in the amount specified in subparagraph 2. of this paragraph, the subject industrial entity

shall pay to the Commonwealth an amount equal to the difference between the aggregate incremental taxes collected by the Commonwealth to such date of disposition and the principal amount of such revenue bonds.

(b) As an alternate to the initial conveyance of an industrial development project to an industrial entity, such industrial development project may be leased to such industrial entity upon such terms as the commission and the commerce cabinet shall determine to be proper, and in such case, subject to the provisions of subparagraphs 1., 2. and 3. of subsection (3)(a) of this section, provision may also be made for title to such industrial development project to be conveyed to the subject industrial entity at such time as the Commonwealth has collected incremental taxes in respect of the industrial development project in an amount equal to the principal amount of any revenue bonds issued to finance such industrial development project.

(c) It is hereby determined and declared as a legislative finding of fact that the provisions and requirements of subsection (3)(a) and (b) of this section provide for the receipt by the Commonwealth of fair market value for any industrial development project conveyed to an industrial entity pursuant to this Act.

(d) The commerce cabinet is authorized and empowered to initiate industrial development projects and to finance such projects pursuant to the provisions of this chapter. When revenue bonds are issued for the financing of any such industrial development project, the commerce cabinet is authorized and empowered to enter into financing agreements or lease agreements with the commission providing for the making of financing payments by the commerce cabinet from appropriations made to the commerce cabinet as, if and when received, for the amortization of revenue bonds so issued, provided, that no such obligation shall be binding upon the commerce cabinet for a period extending beyond the legislative biennium during which

such obligation is incurred, but such obligation may be renewed during successive biennial periods by the commerce cabinet. The issuance of any revenue bonds, notes or other obligations for the financing of industrial development projects shall be directed by and approved by the commerce cabinet not more than sixty (60) days prior to the date of the issue of such obligations, and no bonds, notes or other obligations shall be issued by the commission for and on behalf of the commerce cabinet, except upon such express direction and upon compliance with subsection (3) of this section. Any portion of an industrial development project may be financed by a city or county of the Commonwealth in the same manner as a financing by the commission under this Act or pursuant to the statutory authority of such city or county. In such event, the commerce cabinet may enter into similar financing agreements or lease agreements with such city or county in order to make proper provision for such financing.

(4) The cabinet, in providing for the expenditure of funds for any of the purposes mentioned in this section, or the commission in providing for the issuance and sale of *revenue* bonds, shall have power to provide by agreement with the state agency affected, or by provision in the trust indenture securing the bonds, such terms and conditions as may be considered appropriate and reasonable so as to permit *either* the leasing to, and use by, any state agency *of any building project or the conveyance or lease of any industrial development project to any industrial entity, any such building project to be paid for by such state agency* [~~which provides funds~~] either:

(a) From its own appropriation; [~~, or~~]

(b) By the issuance of revenue bonds; [~~,~~] or

(c) By means of a proposal to pay a rental for the use of all or any part of any building proposed to be constructed *and any such industrial development project to be paid for*

by the commerce cabinet by the issuance of revenue bonds of the commission, subject to the provisions of subsection (3) of this section, and amortization of such revenue bonds by the commerce cabinet.

The cabinet or the commission, in making any such lease agreement *or financing agreement*, or in making provision in any trust indenture securing revenue bonds, is authorized and empowered to lease all or any part of the *facility financed* [~~building~~] for such term and upon such conditions finance and for such considerations *or enter into financing agreements with the commerce cabinet in respect of any industrial development project* as may appear to be in the public interest.

Section 4. KRS 56.513 is amended to read as follows:

(1) When the state property and buildings commission makes a determination, in accordance with the provisions of KRS Chapter 56, that one or more building projects *or industrial development projects* will be financed by the issuance of revenue bonds, then in anticipation of such financing the commission may borrow money to provide interim financing therefor and issue in evidence thereof its revenue bond anticipation notes, bearing interest at a rate or rates not exceeding the maximum rate permitted for the issuance of such bonds. Such interim financing may be entered into for the commission's own projects, for those of the University of Kentucky and the state colleges or universities or for any other agency of the Commonwealth where approval by the commission is required regarding the issuance of revenue bonds of such an agency. In instances where the revenue bonds involved are to be issued by other agencies, such agencies, with the prior approval of the commission, may borrow money in the same manner and for the same purpose and issue in evidence thereof their own revenue bond anticipation notes, according to rules and regulations promulgated by the commission.

(2) The commission shall solicit proposals for such interim financing from at least three (3) responsible lenders, and shall select in its discretion the best of such proposals consistent with sound financial practices. A selection may be made even though less than three (3) proposals are received. The term of any such revenue bond anticipation note shall not exceed five (5) years; and the same may be renewed, if necessary.

(3) Each revenue bond anticipation note may include prepayment provisions which will allow the commission or other borrowing agency to prepay the loan after giving reasonable notice to the lender; shall identify the revenue bond issue from the proceeds of which the note or notes and any interest thereon are to be paid; and shall include a statement that the note is being issued in anticipation of the identified revenue bond issue, and that neither the note, nor the interest thereon, shall constitute or evidence an indebtedness of the Commonwealth of Kentucky. Each such note and the interest thereon (to any extent not previously paid from other sources) shall be paid from the proceeds of the identified revenue bond issue, when such proceeds have been received and are available.

(4) Instead of borrowing money and issuing revenue bond anticipation notes in the full amount necessary for construction contract purposes, the commission (or such agencies with the prior approval of the commission and according to its rules and regulations), may enter into loan agreements with one or more lenders (determined by the commission to be responsible) according to the terms of which it may be agreed:

(a) That the lender will continuously make available to the borrowing agency a stated maximum amount of money for a stated period of time,

(b) That the borrowing agency may demand and obtain cash advances against such commitment from time to time upon reasonable and agreed notice, and upon issuing in

evidence of each advance a bond anticipation note which will bear an agreed rate of interest, not exceeding the maximum rate permitted for the issuance of the proposed bonds, and

(c) That is consideration of the making of such loan agreement the borrowing agency will pay to the lender or lenders a commitment fee determined by the commission to be reasonable according to financial conditions existing at the time the loan agreement is made.

Such loan agreements may be recorded as receivables upon the books of account of the commission, the secretary of the finance and administration cabinet, or other borrowing agency, and construction contracts may be awarded against the same to the amount of money which the lender contractually agrees to make available to the borrowing agency, the same as in the case of loan agreements made with departments or agencies of the United States government.

(5) Each revenue bond anticipation note issued according to this section, and the receipt of interest thereon, shall be exempt from all taxation by the Commonwealth and all of its subdivisions, municipalities and taxing authorities; and this may be stated as a representation in the text of each such revenue bond anticipation note.

(6) The state property and building commission and other state agencies authorized to issue revenue bond anticipation notes under the terms of this section may as an alternative and if authorized to do so by the governing body of such commission or agency, adopt the procedures for interim financing established for counties, cities, and other municipal corporations, or their agencies, by KRS 58.150.

SECTION 5. A NEW SECTION OF KRS CHAPTER 56 IS CREATED TO READ AS FOLLOWS:

The following provisions shall be applicable to Sections 1 to 4 of this Act:

(1) As used in this section, the following terms shall have the following meanings:

(a) "Commercial paper revenue bonds" means revenue bond anticipation notes which by their terms mature not more than two hundred seventy (270) days from the date of issuance thereof and are to be refunded by the issuance of commercial paper revenue bonds or by refunding revenue bonds; provided, however, that all commercial paper revenue bonds must possess the characteristics set forth and described in subsection (3)(d) of this section.

(b) "Refunding revenue bonds" means revenue bonds issued by the commission to refund outstanding issues of revenue bonds, commercial revenue bonds and variable rate revenue bonds.

(c) "Variable rate revenue bonds" means revenue bonds the rate of interest on which fluctuates either automatically by reference to predetermined formulas and indices or pursuant to the standards set forth in subsection (3)(e) of this section.

(2) The commission may issue and sell revenue or other authorized bonds, including variable rate and commercial paper bonds, to pay all or any part of the expense or cost of or incidental to an industrial development project, in denominations and amounts, as it deems to be for the best interest of the Commonwealth.

(3) (a) Revenue bonds issued to pay the costs of industrial development projects may bear interest at any rate or rates, either fixed or variable in accordance with such method as shall be determined by the commission, shall be payable either annually or at shorter intervals, may be of such terms and maturities, may bear such conversion privileges, may be executed by the manual or facsimile signatures of such officers of the commission, and

shall be executed in such manner and at such time or times, or from time to time, and be payable at such times not exceeding forty (40) years from the date thereof, or, if commercial paper, from the date of initial issuance thereof, and at such place or places as the commission determines.

(b) Such revenue bonds may provide that they or any of them may be called for redemption prior to maturity under conditions determined by the commission before issuing the bonds.

(c) Such revenue bonds may, at any time on or after the earliest redemption date provided therefor at the time of their issuance, be refunded by the commission, in such amount as the commission may deem necessary to refund the principal of the revenue bonds to be refunded, together with any unpaid interest thereon, to create any necessary debt service reserve fund, and to pay any premiums, expenses and commissions required to be paid in connection therewith.

(d) At the time of the initial issuance of commercial paper revenue bonds to pay the costs of industrial development projects, the commission may designate individual officials of any state agency as agents for purposes of approving the principal amount, the interest rate, the discount, if any, and the maturity date of revenue bonds being issued to later refund the maturing commercial paper revenue bonds; provided, however, that at the time of the initial issuance of any such commercial paper revenue bonds, the commission shall set the maximum principal amount, the maximum interest rate, and the maximum discount, if any, of the refunding revenue bonds plus the final maturity date of the last issue of such refunding revenue bonds; and provided further that the commission shall retain the right to revoke any such agent's authority at any time and for any reason whatsoever. Individual issues of commercial paper revenue bonds, issued as part of a continuing financing

program, may be refunded by the approvals of such agents of the commission.

(e) At the time of issuance of variable rate revenue bonds to pay the costs of industrial development projects, the commission may designate individuals or institutions which in the sole judgment of the commission have financial market expertise to serve as agent for the commission for establishing and changing from time to time while such variable rate revenue bonds remain outstanding the rate of interest to be borne by and the price to be paid for such revenue bonds; provided, however, that the rate-setting procedures and authority of each such agent shall be set forth in writing, and may include a formula or an index or indices based upon market factors, and shall be established by the commission at the time of issuance of such revenue bonds; and provided further that at the time of the issuance of such revenue bonds, the commission shall establish the maximum interest rate to be borne by the revenue bonds; and provided further that the commission shall retain the right to remove or replace any such agent at any time for any reason whatsoever.

(f) Any revenue bonds issued and outstanding hereunder to pay the costs of industrial development projects and the interest due on such revenue bonds shall, prior to the maturity or redemption date thereof, be deemed to have been paid to the same extent as if they had actually been paid in cash and retired, if:

1. In the event any of such revenue bonds are to be redeemed on any date prior to their maturity, the commission shall have given a trustee appointed for the holders of such revenue bonds in connection with their issuance, in form satisfactory to such trustee and in conformity with the requirements of the resolution authorizing their issuance irrevocable instructions to give notice of redemption of such revenue bonds to the holders thereof by written notice which is satisfactory to such trustee;

2. There shall have been deposited with the trustee either money in an amount which shall be sufficient, or direct obligations of or obligations guaranteed by the United States of America, or other obligations specified by the commission, the principal of and the interest on which, when due, will provide money which, together with the money, if any, deposited with the trustee at the same time, shall be sufficient, to pay when due the principal and the interest due and to become due on such revenue bonds on and prior to redemption date or maturity date thereof, as the case may be; and

3. In the event that such revenue bonds are not to be redeemed within the next succeeding sixty (60) days, the commission shall have given the trustee in form satisfactory to it irrevocable instructions to give, as soon as practicable, in a manner satisfactory to it, a notice to the holders of such revenue bonds that the deposit required by subparagraph 2. of the paragraph has been made with the trustee, that such revenue bonds are deemed to have been paid in accordance with the provisions hereof and stating such maturity or redemption date upon which money is to be available for the payment of the principal of and interest on such revenue bonds.

(g) It is hereby declared and determined that the issuance of any and all refunding bonds as provided herein wil be for a public purpose if the commission so declares in the proceedings authorizing same.

(h) If any officer whose signature or countersignature appears on revenue bonds issued to pay the costs of industrial development projects ceases to be such officer before delivery of the bonds, his signature or countersignature shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until delivery. Any such revenue bonds issued to pay the costs of industrial development projects shall be sold upon such terms as the commission deems best, either at public or private

sale, and for such price, as the commission may determine. In the event the revenue bonds are sold at private, negotiated sale, the commission shall publish in accordance with the requirements of KRS Chapter 424 a notice of the intent of the commission to negotiate the sale of such revenue bonds within thirty (30) days of such proposed sale, which notice shall include the identification and description of such revenue bonds, an estimate of the week during which the negotiated sale is expected to occur and the identity of the state officer or agency and the fiscal advisor or managing underwriter from whom further information regarding the revenue bonds may be obtained. Revenue bonds, notes or other obligations issued by the commission under this chapter, the income thereon, and the transfer thereof, including any profit made on the sale thereof, shall at all times be exempt from taxation or assessment of any type by the Commonwealth, its agencies and departments, and by all political subdivisions within the state. Nothing contained in this section shall preclude or prevent the authorization and issuance by the commission from time to time of revenue bonds, notes or other obligations, the receipt of interest on which may be subject to federal income taxation.

(4) The payment of revenue bonds issued to pay the cost of an industrial development project, together with the interest thereon, may be secured by a pledge of and a first lien on all of the receipts and revenue derived, or to be derived, from the rental, financing or operation of the industrial development projects involved including rentals and financing payments made by the commerce cabinet from appropriated funds on a biennial basis, pursuant to lease agreements or financing agreements between the commerce cabinet and the commission. Neither the payment of any revenue bond, nor the interest thereon, issued under the authority of this section shall constitute an indebtedness of the Commonwealth of Kentucky, nor shall any revenue

bond or interest thereon be payable out of any fund except funds derived from rentals, financing payments or other revenues derived from the operation of the industrial development projects or from revenues as are available for the purpose by law.

(5) In the event revenue bonds are sold at public, competitive sale, such revenue bonds issued by the commission under the provisions of this section shall be sold after newspaper advertising conforming to the requirements of KRS Chapter 424.

(6) In the event revenue bonds are sold at public, competitive sale, competitive bids for the sale of such revenue bonds shall be opened and read publicly by the secretary of the finance and administration cabinet or his representative at a designated place, day and hour, all of which shall be announced in the advertising made relative thereto.

(7) All money from the sale of revenue bonds issued pursuant to this section shall be deposited in the state treasury and shall be credited to a special account to be designated as directed by the cabinet, and no part thereof shall be withdrawn from the state treasury except for the purposes authorized by KRS Chapter 56, together with the cost incidental to the issuing and selling of the revenue bonds and other expenses directly related thereto. The commission may provide in any trust indenture securing revenue bonds for additional terms and conditions thereof, or for other restrictions not in conflict with KRS Chapter 56.

Section 6. Whereas, a potential loss of thousands of jobs and millions of dollars of tax revenue to the Commonwealth and its citizens does now exist unless certain laws respecting industrial development and the financing thereof are revised and provided for, an emergency is declared to exist, and this Act shall became effective upon its passage and approval by the Governor.

Supreme Court, U.S.
FILED
JUL 22 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 87-2094

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GORDON TAUB - - - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY, and MARTHA LAYNE COLLINS, in her official capacity as Governor of the Commonwealth of Kentucky; the COMMERCE CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; CARROLL KNICELEY, in his official capacity as Secretary of the Commerce Cabinet of Kentucky; the FINANCE AND ADMINISTRATION CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; the HUMAN RESOURCES CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; E. AUSTIN, JR., in his official capacity as Secretary of the Human Resources Cabinet of Kentucky; and the STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY, an agency of the Commonwealth of Kentucky - - - - - - - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTER-QUESTION PRESENTED

The Respondents (Commonwealth) are dissatisfied with Question 1 presented by Petitioner (Taub) because it is incomplete, unclear and not fairly presented. In lieu thereof, the Commonwealth submits the following question presented:

1. Whether a state taxpayer, who has not suffered and will not suffer pecuniary injury, has standing to challenge the validity of a state statute authorizing the Commonwealth, after a finding of economic feasibility and public benefit, to offer economic inducements in the form of land, services, and the like to entice industrial development and to enter into contracts for that purpose, utilizing general state tax revenues to satisfy the cost of the inducements.

Question 2 presented by Taub is unnecessary as embraced by Question 1.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

The statement by Taub in his Petition is incomplete in material respects, requiring this Supplemental Statement.

The Commonwealth, like its forty-nine sovereign counterparts, is competing with its counterparts and others to attract foreign industry by offering inducements and entering into contracts. The statute assaulted provides the machinery to do so, utilizing general tax revenues for that purpose. The particular facts here, presented in proper perspective, are succinctly stated by Chief Judge Lively in the Opinion of the United States Court of Appeals for the Sixth Circuit:

> The facts are not in dispute. During the administration of the defendant Martha Layne Collins, former Governor of Kentucky, Toyota Motor Corporation (Toyota) determined to build a large automotive assembly plant in Scott County, Kentucky. As part of negotiations leading to this decision, Kentucky and Toyota entered into a contract by which the Commonwealth agreed to acquire land for the plant and to expend, or make available to Toyota, an amount not exceeding $20,000,000 for site preparation, engineering and improvements. The total cost to the Commonwealth was estimated at $35,000,000, and the improved site was to be conveyed to a designated affiliate of Toyota in fee simple at no cost. In return, Toyota agreed to construct an assembly plant at a cost of approximately $800,000,000 that would employ approximately 3,000 people.

> The agreement provided that appropriate legislation would be submitted to the Kentucky General Assembly authorizing financing of the site acquisition and improvements by the issuance of revenue bonds of the Comonwealth. The agreement contemplated that the revenue bonds would be retired from "incremental taxes," defined as property taxes on the site, state corporate income taxes, state income taxes on employees at the Toyota plant, and other revenues received by the Commonwealth that exceeded taxes collected by the Commonwealth with respect to the project site in the fiscal year immediately preceding that in which construction of the facility commenced.
>
> The required legislation was adopted by the General Assembly at its regular 1986 session, and the revenue bonds were issued and sold. The legislation provided as a condition precedent to the transfer of land to Toyota that the State Property and Buildings Commission make findings that the project was economically feasible and desirable. This requirement was satisfied by a study which calculated the incremental taxes resulting from the Toyota plant at approximately $13,200,000 per year. Following conveyance of the improved real property, Toyota began construction of the assembly plant.

[*Taub* v. *Com. of Ky.*, 842 F. 2d 912, 913-914 (6th Cir. 1988)]

Taub admits he cannot demonstrate any past, present or future pecuniary loss. In fact, the Toyota Project has been completed, has employed workers and is now producing automobiles. All indications are that

Taub, as a state taxpayer, will be benefited financially by incremental taxes from the Project reducing his taxes. The factual situation was aptly expressed by District Judge Bertelsman in his findings:

> Until the oral argument on various motions to dismiss, it was not clear that Taub was not asserting any rights as a landowner. When pressed by the court, however, Taub's counsel admitted that standing was claimed only as a taxpayer. When pressed further as to whether Taub could show any actual economic injury in the form of a past or probable future tax increase, counsel admitted that he could not and claimed no actual injury. This was apparently because Taub's annual tax bill was only $1,200.00 and if the Commonwealth's economic projections are correct, the result of its inducing Toyota to locate a plant here will cause it to reap so many benefits in the form of increased tax revenues that Taub and the rest of us will pay less taxes. Therefore, not only can Taub not show an economic detriment from these expenditures, it is equally or more likely that he will derive an economic benefit. At least he admits he can make no showing to the contrary.
>
> Taub, however, presents himself to the court as a fiscal conservative to whom public expenditures of the kind to be made here are anathema. He does not believe that government has any business expending taxpayers' money on direct grants to private enterprises, no matter how laudatory the motives.

[Pet. 18a]

It was in this setting that the Governor of Kentucky, pursuant to the authority vested in her by Chapter 56 of Kentucky Revised Statutes, entered into a Contract with Toyota Motor Corporation (Toyota) on February 25, 1986, by the terms of which Toyota argeed to construct an $800 million automobile factory at Georgetown, Kentucky, and employ therein approximately 3,000 workers, in consideration for which the Commonwealth agreed to and has furnished Toyota the plant site, certain improvements and other incidental benefits.

Taub complains that the *quid pro quo* furnished by the Commonwealth and paid for by general fund tax dollars constituted an expenditure of public money for a non-public purpose in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, citing *Citizens Savings & Loan Ass'n.* v. *City of Topeka,* 87 U.S. (20 Wall.) 655 (1875).

The record clearly demonstrates that the inducements furnished to Toyota were overshadowed by and were more than compensated for by the tax benefits to the Commonwealth under the contract. Taub did not show otherwise. The *quid pro quo* flowing to the Commonwealth was more than adequate.

The District Court dismissed Taub's Complaint for lack of standing [Pet. 17a-25a]. The United States Court of Appeals for the Sixth Circuit affirmed. *Taub* v. *Com. of Ky.,* 842 F. 2d 912 (6th Cir. 1988). Taub seeks review by this Court.

SUMMARY OF ARGUMENT

The Commonwealth entered into a good-faith arms-length contract with Toyota Motor Corporation. Tax monies from the general fund were used by the Commonwealth to furnish the consideration. The contract was for a public purpose, i.e., inducing Toyota to build an $800 million plant and employ 3,000 workers in Kentucky. The contract will generate incremental taxes far in excess of the general fund expenditures by the Commonwealth.

Taub claims standing only as a state taxpayer owning property in Kentucky. He has not suffered and will not suffer pecuniary loss.

Taub is without standing to assert that such expenditures by the Commonwealth are constitutionally infirm because not for a public purpose. One who seeks standing must show (1) that the statute is invalid *and* (2) he has sustained or is immediately in danger of sustaining direct injury as a result of the statute. It is insufficient that he suffers in common with taxpayers generally.

Taub's state taxpayer standing requirements are governed by *Doremus* v. *Board of Education,* 342 U.S. 429 (1952) and *Williams* v. *Riley,* 280 U.S. 78 (1929).

This Court expanded standing in taxpayers' actions involving First Amendment violations in *Flast* v. *Cohen,* 392 U.S. 83 (1968). In *Flast* this Court devised a new two-pronged test to determine standing only in First Amendment cases. *Flast* has no application to

state taxpayers' cases and its application is inappropriate here.

The monies expended by the Commonwealth to induce industrial development are for a public purpose. The legislative and judicial determination by the Kentucky Legislature and Kentucky's highest court are binding on this Court. The purpose will be found other than public only if the purported public purpose is palpably without reasonable foundation. A reasonable public purpose foundation exists here.

The Commonwealth as a sovereign state has the power to contract for the benefit of its citizens. The subject contract is an arms-length transaction with adequate consideration flowing in both directions. It serves a valid public purpose. Federalism and comity preclude federal judicial interference.

Conflict between the Circuits does not exist in principle. Any conflict is in the application of peculiar facts to well-settled principles and does not rise to a status warranting certiorari.

ARGUMENT

1. The Claimed Constitutional Infirmity.

Taub claims the Kentucky Statute and the implementing acts of the Governor and other officials thereunder are constitutionally infirm in that they expend public funds in aid of a private industrial enterprise not for a public purpose. Taub cites numerous cases supporting the principle that a gift of public tax funds to an industry not for a public purpose is constitution-

ally impermissible [Pet. 23]. Taub relies on *Citizens Savings & Loan Ass'n. v. City of Topeka, Id. Citizens* was decided in 1875. Two years later this Court decided *Township of Burlington* v. *Beasley,* 94 U.S. 310 (1877). The *Burlington* Court upheld an expenditure of public funds in aid of an industry as a public purpose, citing *Citizens* as controlling [94 U.S. 314]. *Hawaii Housing Authority* v. *Midkiff,* 467 U.S. 229 (1984) is this Court's latest pronouncement bearing on public purpose. The public purpose issue is relevant here only to the extent it affects standing.

2. Taxpayer Standing Requirements in General.

Taub admits and the record demonstrates that Taub has not sustained nor will he sustain any direct financial or pocketbook injury as a result of the expenditure of public funds in connection with the Toyota Project. To the contrary, the record shows that he will benefit as a taxpayer through increased tax revenues to the Commonwealth. At worst, the tax benefits to the Commonwealth from the Toyota Project may not be so bountiful as projected. In short, any loss claimed by Taub is at best speculation and surmise. His posture is the same as and in common with the taxpayers of Kentucky generally.

It would serve no useful purpose to trace the "standing" requirements from their early constitutional origin to the present. We join Judge Lively in starting with the general taxpayer standing requirements announced in *Frothingham* v. *Mellon,* 262 U.S.

447 (1923). The requirements were succinctly stated by this Court as:

> The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

[*Id.* at 488].

These requirements, based upon core federal jurisdictional principles, must be applied generally to constitutional assaults on the legislative acts of all sovereigns (federal or state) absent specific exceptions or special circumstances. None exist here.

The *Frothingham* requirements remain intact today with respect to taxpayers' actions based upon constitutional infirmities other than violations of the First Amendment to the Constitution of the United States. In *Flast* v. *Cohen,* 392 U.S. 83 (1968), this Court revisited *Frothingham* only to the extent of "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Id.* at 85. This Court there formulated a new two-pronged test applicable only to First Amendment taxpayers' actions. Taub contends the *Flast* two-pronged test applies to him and he has standing. The Court of Appeals held otherwise.

The decision below is obviously sound and the Petition should be denied.

3. The State Taxpayer.

It is clear that Taub as a state taxpayer occupies the same position with his sovereign (Commonwealth of Kentucky) as did Frothingham with his sovereign (United States of America). The federalism interwoven throughout the Constitution of the United States compels a statute enacted by the legislature of one of the sovereign states be accorded the same protection given an act of the Congress of the United States. The taxing and spending statutes of the several states are as much the lifeblood of state government as the taxing and spending statutes of the Congress are essential to the federal government. They are interrelated and interdependent. The welfare of this nation is dependent on the protection of both federal and state revenue statutes from impermissible impingement by the federal judiciary.

This Court's decisions in *Doremus* v. *Board of Education,* 342 U.S. 429 (1952) and *Williams* v. *Riley,* 280 U.S. 78 (1929) govern Taub's standing. Both are state taxpayer cases and both cite *Frothingham* as controlling.

Absent First Amendment intrusion, *Frothingham* and the requirements established thereby control state taxpayer cases. Taub has no standing.

4. The Impact of Flast.

It is clear *Frothingham* controls all state and federal taxpayer standing where First Amendment im-

pingement is not asserted. The Sixth Circuit so holds and the current status of this Court's decisions clearly so indicate. Taub contends otherwise. The Opinion below is sound. *Flast* has no application.

The Commonwealth contends Taub lacks standing even under *Flast*. The District Court agreed [Pet. 18a-24a]. Judge Bertelsman noted the many decisions of this Court since *Flast* requiring a direct, distinct and palpable injury which is not abstract, conjectural or hypothetical [*Id.* 23a]. The direct injury requirement applies even in First Amendment cases [*Id.* 22a-24a]. Judge Bertelsman concluded, and properly so, that Taub was without standing even under *Flast*.

Taub did not acquire standing under *Flast* for another reason. The second nexus required by *Flast* is that the "taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the [state] taxing and spending power . . ." [*Flast*, at 102-103]. Taub did not meet the second requirement because his challenge to the subject statute (and the Toyota Project) fails to establish constitutional transgression.

The legislation assaulted, by its very terms, is for a public purpose. [Pet. 27a-45a] KRS 56.440 *et seq.* Taub simply alleges a gift of property purchased with tax dollars, citing *Citizens*. But on the motion to dismiss the record demonstrated without contradiction that the property and services paid for by tax dollars were the *quid pro quo* of an arms-length contract solemnly entered into in writing between the Common-

wealth and Toyota with more than adequate consideration flowing to the Commonwealth. So, on the motion to dismiss, operating as a motion for summary judgment, the burden was on Taub to come forward and demonstrate the necessary elements of standing. *Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986); *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Taub did not carry his burden. Thus, Taub failed to demonstrate a viable claim that the assaulted statute was constitutionally impermissible.

The statute says it is for a public purpose, including employment of Kentucky citizens [Pet. 27a-45a]. The Supreme Court of Kentucky held the Statute and the Toyota Project to be for a public purpose. *Hayes* v. *The State Property and Buildings Commission of Kentucky,* Ky., 731 S. W. 2d 797 (1987). The Kentucky court's holding is in accord with this Court's decision in *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495 (1936) where Justice Stone said:

> We need not labor the point that expenditures for the relief of the unemployed, conditioned on unemployment alone, without proof of indigence of recipients of the benefits, are a permissible use of state funds.

[*Id.* at 515].

This Court pointed out in *Midkiff* that legislative enactments, such as the statute under attack, are matters of legislative policy and not judicial policy. As such, public purpose, when so determined by the legislative body, is not subject to judicial invalidation as not serving a public purpose unless it is clearly estab-

lished that the asserted public purpose is "palpably without reasonable foundation" [467 U.S. 241].

It is not for this Court to determine whether the Toyota Project serves the interests of the citizens of Kentucky. The Kentucky Legislature has spoken and the Kentucky Supreme Court has decided the issue. The finding of a valid Kentucky public purpose by the Legislature and the Kentucky Supreme Court is binding on this Court. As Justice Brennan put it in *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963):

> We have no doubt that the opinion of the Supreme Court of Appeals in the instant case was intended as a full and authoritative construction of Chapter 33 as applied in a detailed factual context. That construction binds us. For us, the words of Virginia's highest court are the words of the statute.

[371 U.S. 432].

The Commonwealth has the power and duty to act and contract for the benefit of its citizens. Such is the fundamental purpose for its existence. The subject contract, made for that purpose, is well within the constitutional power of the Commonwealth. *The Ohio Life Insurance and Trust Co.* v. *Debolt,* 57 U.S. (16 How.) 416 (1853).

Taub has failed to demonstrate a viable constitutional claim upon which to base a "case" sufficient for the requisite standing.

5. Federalism and Comity.

The reluctance of the federal judiciary to intrude into the arena entrusted to the Congress flows naturally

from the separation of powers doctrine. On the same level is federal judicial intrusion into the legislative and administrative matters of a sovereign state. The interplay created by federal judicial intrusion into state taxation, state spending and state programs for the welfare of state citizens undermines the very foundation of our federalist structure. The court below expressly stated that concern. [842 F. 2d 918-919] To the authorities cited by the court below we add *Fair Assessment in Real Estate* v. *McNary,* 454 U.S. 100 (1981).

The impact of federalism and comity on the federal judiciary is not restricted to matters of state taxation. The concerns of federalism and comity extend to all functions of state government, including the state judiciary and administrative tribunals. *Younger* v. *Harris,* 401 U.S. 37 (1971); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975); *Juidice* v. *Vail,* 430 U.S. 327 (1977); *Moore* v. *Sims,* 442 U.S. 415 (1979).

The assault by Taub upon this ambitious and highly successful effort by the Commonwealth to upgrade substantially the fiscal welfare of its citizens strikes at the very heart of self-determination by the citizens of the sovereign states. Comity compels restraint. The federal judiciary should never permit the United States Courts to be used to suppress or chill the right of the sovereign states to act for the welfare of their citizens.

6. Conflict Between the Circuits.

Taub suggests there exists a substantial conflict between the Circuits which this Court should resolve.

Taub points to *Hoohuli* v. *Ariyoshi*, 741 F. 2d 1169 (9th Cir. 1984) as creating that conflict. The *Hoohuli* court discussed *Frothingham* and *Doremus* at page 1179 and concluded, "*Flast* does not appear to have affected the availability of standing for state taxpayers challenging state statutes." This is precisely what the Sixth Circuit held. The *Hoohuli* court concluded at page 1180, "We are thus left with *Doremus* in its original form to guide us in questions of state taxpayer standing." The Sixth Circuit agrees.

The *Hoohuli* court went on to hold that "some of the individual plaintiffs" have standing because their case was a "good-faith pocketbook action." At the same time, the court held that the remaining state taxpayers, as plaintiffs, may not have had standing as state taxpayers under *Doremus* and remanded the cause for a determination.

A careful reading of the majority opinion and the dissent in *Hoohuli* clearly discloses that the conflict is in the application of the principles to the peculiar facts in *Hoohuli*. The disagreement is whether the evidence shows a sufficient good-faith pocketbook injury to the plaintiffs given standing. Factual application problems, even errors, are not conflicts of substance between the Circuits sufficient to warrant certiorari.

Taub's claim of conflict among the Circuits is also based in part on *Public Citizen, Inc.* v. *Simon*, 539 F. 2d 211 (D.C. Cir. 1976). *Public Citizen* involved a federal taxpayer's action challenging claimed constitutionally impermissive executive spending. The trial

court denied standing and dismissed. Dismissal was affirmed. No state taxpayers were involved.

CONCLUSION

Taub presents no "case or controversy." The elements lacking are (1) a viable constitutional claim and (2) a good-faith pocketbook injury. Without either there can be no standing. Without both, certiorari should certainly be denied. Taub has neither.

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